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FILED
APR 30 1954
HAROLD B. WILLEY, Clerk

No. [redacted] 61

IN THE

Supreme Court of the United States

October Term, 1953

CAPITAL TRANSIT COMPANY, *Petitioner,*

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA and POTOMAC ELECTRIC POWER COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Capital Transit Company ("Transit"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on December 10, 1953, as amended by its order of February 25, 1954. In its judgment, the Court of Appeals reversed a judgment of the United States District Court for the District of Columbia, dated May 7, 1952 (R. 752), affirming Orders No. 3762 and No. 3774 of the Public Utilities Commission of the District of Columbia ("Commis-

sion"). In these orders, issued in February and March, 1951, the Commission authorized increases in the District of Columbia rates of Potomac Electric Power Company ("Pepco").

OPINIONS BELOW

The opinion of the Court of Appeals (R. 1318) is not yet reported. The opinion of the District Court (R. 733) is reported at 104 F. Supp. 553. The Commission's Orders No. 3762 (R. 1111) and No. 3774 (R. 1197) are not reported.

JURISDICTION

The judgment of the Court of Appeals (R. 1350) was entered on December 10, 1953, and amended by an order dated February 25, 1954, (R. 1390). This Court, on February 25, 1954, granted this petitioner an extension of time to and including May 8, 1954, in which to petition for a writ of certiorari. This Court has jurisdiction of this petition under Sections 1254(1) and 2101(c), Title 28, U. S. Code, and Section 43-705, D. C. Code (1951).

QUESTIONS PRESENTED

(1) Where a statutory appeal is brought to the Court of Appeals under the appropriate review section of the D.C. Code (Section 43-705, D. C. Code (1951)), is that court empowered to expand the jurisdiction of the District Court by remanding the case to that court with instructions to take certain action which is beyond the scope of the review power of the District Court under that section?

(2) Are the orders of an administrative agency, found by the Court of Appeals to be "erroneous" because they are unsupported by proper findings of fact, still enforceable and valid upon remand by the District Court to the administrative agency for further proceedings in accordance with the opinion of the Court of Appeals?

(3) Is a rate-payer who has successfully prosecuted an appeal from "erroneous" rate increase orders of an ad-

ministrative agency entitled to be restored to the position that he would have occupied had the rate orders been set aside, as they should have been, in the first instance?

(4) Can the "erroneous" 1951 rate increase orders of an administrative agency be validated in 1954 on a retroactive basis?

STATUTES INVOLVED

The pertinent parts of the statutes involved are set forth in the Appendix, *infra*, pp. 39-44.

STATEMENT

This case involves a rate increase proceeding, initiated by Pepco in 1950. In 1951, the Commission entered rate increase orders in response to Pepco's application. In 1952, the District Court declined to set aside these rate increase orders. In 1953, the Court of Appeals ruled that the rate increase orders were "erroneous", but instead of directing that the orders be set aside, the Court of Appeals remanded the case to the District Court "with instructions to remand the case to the Commission for further proceedings."

On February 25, 1954, the Court of Appeals modified its 1953 judgment by ordering that Pepco should "segregate on its accounts all amounts [heretofore] collected from the Capital Transit Company by reason of the rate increase." The Court also ordered that Transit should "henceforth . . . segregate on its accounts amounts equivalent to the said increase."

Obviously, the underlying concept of the February 25, 1954 order of the Court of Appeals was the belief that the ultimate disposition of the two segregated funds could be allowed to depend on the outcome of the subsequent proceedings before the Commission.

Under Sections 43-401—411—911, D. C. Code (1951, *infra*, pp. 39, 40, 44) the Commission is given jurisdiction to establish just and reasonable rates for utility services in the District of Columbia. Under Section 43-704 (*infra*,

p. 41), any person affected by an order of the Commission establishing utility rates may make an application to the Commission for reconsideration of the order. And, if the Commission should deny the application for reconsideration, the person affected has the right, under Section 43-705 (*infra*, p. 42), to appeal to the United States District Court for the District of Columbia for review of the rate order. Section 43-705, so far as here material, specifically provides that the District Court upon the conclusion of its hearing of such an appeal "shall either dismiss the said appeal and affirm the order . . . of the Commission or sustain the appeal and vacate the Commission's order . . . " No alternative jurisdiction is conferred upon the District Court after the conclusion of a hearing on an appeal from an order of the Commission.

The questions presented by this petition for certiorari arise because the Court of Appeals in its judgment of reversal (R. 1350) and in its modification of February 25, 1954 (R. 1390), did not, consistently with the pertinent provisions of Section 43-705, direct the District Court to either affirm or vacate the orders of the Commission but, instead, directed it to exercise jurisdiction not conferred on it; that is, to remand the case to the Commission for further proceedings in accordance with the decision and judgment of the Court of Appeals. This attempt of the Court of Appeals to modify the statutory limitations on the review powers of the District Court gives rise, as we shall show below, not only to novel and important questions involving the proper construction of Section 43-705, but also to important questions concerning the scope and purpose of judicial review of administrative rate orders and the rights of parties under statutes entitling them to review of such orders. These questions involve, among other things, not only a conflict between the instant decision of the Court of Appeals and one of its prior decisions, but also conflicts with decisions of this Court and with the decision of another Court of Appeals.

In so far as they bear upon the questions presented by

this petition, the proceedings before the Commission, the District Court, and the Court of Appeals may be summarized as follows:

1. PROCEEDINGS BEFORE THE COMMISSION. Pepco operates an integrated electric utility system involving the generation, transmission, and distribution of electric energy. Its service area comprises some 639 square miles. This area includes all of the District of Columbia, a small area in Virginia, and substantial areas in Prince Georges and Montgomery Counties in Maryland. (R. 1114-1115.) The District of Columbia accounts for but 69 square miles of this 639 square miles of service area (Tr. 2836; Ex. 16, R. 808-813). Its service area in the District of Columbia and Virginia involves urban service; its service area in Maryland involves both urban and suburban service. It also renders service to certain interstate consumers. Rates charged to its Virginia and Maryland customers are regulated by the regulatory authorities of those States; rates charged to its interstate customers by the Federal Power Commission. (R. 1113-1114, 1328.)

On July 28, 1950, Pepco filed with the Commission an application for increases in its District of Columbia rates (R. 757-769). These increases were not predicated upon its computations of its needs for additional revenue from its District of Columbia operations but from its total system-wide operations. The total increases requested amounted to $3,500,000 on a system basis. Among the increases requested was an increase of $661,000 in the rate charged Transit for power to operate its street railways [1] (R. 766).

[1] The rate increases proposed by Pepco would have involved the following percentage increases for various classes of customers (R. 1156):

Residential	4.3%
Commercial low voltage	5.6%
Commercial high voltage	10.6%
Street railways	
a) 600 volt service	57.8%
b) Commercial service	93.5%

Transit and other District of Columbia consumers, including the United States, petitioned for, and were granted, the right to intervene in the proceeding before the Commission (R. 773). Thereafter, hearings on the application were commenced on August 11, 1950, and were carried on intermittently until their conclusion on March 14, 1951 (R. 1-709).

At the hearings on the application, Pepco supported its request for increases in its District of Columbia rates by evidence showing only its system-wide rate base, its system-wide operating expenses, and its system-wide revenues (R. 1115). It did this in face of Transit's contention during the course of the proceedings that these system-wide figures were insufficient to support an application for increases in District of Columbia rates (R. 75-76, 255-256).

The Commission had in previous proceedings (cf. R. 1148-1149; *Washington Gas Light Co.* v. *Baker,* 188 F. 2d 11 (1950)) adopted the prudent investment theory of rate regulation. Yet Pepco did not in the instant proceeding introduce before the Commission evidence on the items necessary to a determination of a rate of return under that theory of rate making; that is, on such items as: return necessary to service funded debt; return necessary to service preferred stock; return necessary to attract investors in common stock; and the return on funded debt, preferred stock, and common stock in other utilities having a risk factor similar to Pepco's. (cf. R. 1334.) Instead, Pepco put in evidence to show merely what it considered to be its dollar needs for the maintenance of a sound financial position, especially as those dollar needs related to financing that it was then contemplating (R. 1147-1148). Furthermore, no witness for the Commission or any of the intervenors put in evidence on all of the items required for the determination of a rate of return under the prudent investment theory of rate making (cf. R. 1335-1336).

On February 12, 1951, the Commission issued its Order No. 3762 (R. 1111-1177). In this order the Commission

found that Pepco was entitled to increases in its rates that would produce an annual increase of $2,600,000 in its operating revenues from its entire service area (R. 1173, 1177). This increase was determined percentagewise for the various classes of consumers as follows (R. 736):

Residential	5.5%
Commercial low voltage	6.3%
Commercial high voltage	8.6%
Street railways	23.1%

The increase in Pepco's street railway rate on a system basis, as determined in the Order, was $230,000 (R. 1173). In addition, the Commission, rejecting Pepco's "dollars needed" theory of rate making, found that Pepco under the prudent investment theory of rate regulation was entitled to a 5½% rate of return (R. 1176).

Thereafter, Pepco, as directed by the Commission in Order No. 3762 (R. 1177), filed rate schedules with the Commission setting forth increases in the various classes of rates designed to produce an annual increase of approximately $2,600,000 in its system operating revenues (Ex. 95; R. 1107-1110). The schedule for the street railway rate was designed to produce an annual increase of $223,000 on a system basis (R. 1110). Of this amount, $209,000 was allocated to the District of Columbia (*id.*). On March 20, 1951, the Commission, by Order No. 3774, approved the schedules of increased rates filed by Pepco and ordered them to go into effect on April 20, 1951 (R. 1197-1199). In approving the system-wide schedules filed by Pepco, the Commission did not, as to those rates which were uniform throughout Pepco's system, find that the conditions pertinent to the establishment of those rates were the same throughout the system; nor did it, as to those rates which differed between the District and the rest of its system, find that there were relevant conditions that justified the differentials (R. 1329-1330).

2. Proceedings in the District Court. Following the denial by the Commission of their applications for recon-

sideration of Orders Nos. 3762 and 3774 (R. 1179, 1220-1222), Transit, the United States and Herbert P. Leeman, an individual rate payer, pursuant to § 43-705 of the D. C. Code (1951), appealed to the District Court (R. 712).[2] Following argument by the parties and submission of briefs, Honorable Alexander Holtzoff, Judge of the District Court, issued his opinion dated April 30, 1952, affirming the orders of the Commission (R. 733-752). Judgment was entered accordingly on May 7, 1952 (R. 752). Transit alone filed a notice of appeal on June 6, 1952 (R. 752-753).

3. Proceedings in the Court of Appeals. Before the Court of Appeals, Transit argued that Order No. 3762 and Order No. 3774 were invalid for three alternative reasons. *First:* The Commission lacked authority to fix District rates on the basis of system-wide operations. *Second:* The Commission, in determining Pepco's rate of return under the prudent investment theory of rate making, did not, as required by the decision of the Court of Appeals in *Washington Gas Light Co.* v. *Baker, supra,* obtain evidence and make findings on the items necessary to the proper determination of a rate of return under that theory; that is, on such items as return necessary to service funded debt; return necessary to service preferred stock; return necessary to attract investors in common stock; and the return on similar items for other utilities having a risk factor comparable to Pepco's. *Third:* The increase ordered in street railway rates was invalid for failure of the Commission to make adequate findings in support thereof. After argument by the parties and submission of briefs and memoranda, the Court of Appeals, on December 10, 1953, issued its opinion and judgment

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[2] Transit's appeal was designated as Civil Action No. 2400-51 the District Court; Leeman's, as Civil Action No. 2835-51; and the United States', as Civil Action No. 2497-51. These three appeals were ordered consolidated for hearing before the District Court (Tr. 2805).

reversing the District Court's judgment affirming Order No. 3762 and Order No. 3774 (R. 1318).

The majority of the court (Stephens, C. J., and Miller, J.) sustained Transit's exact position on the second, or rate of return issue. On this issue, the Court specifically stated that the case should be returned to the Commission for the taking of additional evidence as well as the making of further findings of fact (R. 1337). In addition, the court upheld the substance of Transit's position on the first and third issues (R. 1319-1330; 1338-1349, 1331).

On the first issue, involving the propriety of rate making on a system basis, the court unanimously held that the Commission could establish Pepco's District of Columbia rates either on the basis of its District of Columbia operations, as measured by an allocation of its rate base, expenses, and revenues attributable to the District, or, if certain conditions were met, on the basis of its system operations. It held that the conditions necessary to the establishment of rates on a system basis were that the Commission find: (1) that, as to those rates which were the same throughout Pepco's system, the conditions pertinent to the establishment of those rates were also the same throughout the system; and (2) that, as to those rates which differed between the District and the rest of Pepco's system, there were relevant conditions that justified the differentials. The court pointed out that the Commission, while choosing to establish Pepco's rates on a system-wide basis, had not made these requisite findings. And it held that Transit, by demonstrating the lack of these requisite findings, had sustained the burden of its attack on the Commission's orders under the first issue (R. 1329). The court did not, however, hold that the Commission had improperly excluded any evidence on this issue or that the record did not contain substantial evidence thereon.

On the third issue, involving the validity of the increase ordered in street railway rates, Chief Judge Stephens was of the opinion that Transit's position should be upheld.

His opinion made it clear that the Commission did not support the increase ordered in these rates with adequate basic and ultimate findings of fact. Judges Miller and Fahy, while in complete agreement that the findings were not adequate to sustain the increase, felt that it was not necessary to pass on the question in view of the court's holdings on the other two issues (R. 1331). Here again the court did not hold that the Commission had improperly excluded any evidence on this issue or that the record did not contain substantial evidence thereon.

After making these rulings on the merits of the case, the Court of Appeals reversed the judgment of the District Court with instructions "to remand the case to the Commission for further proceedings in accordance with this opinion" (R. 1331). But the court did not hold Orders No. 3762 and No. 3774 invalid.

On December 23, 1953, Transit filed a motion asking the Court of Appeals to clarify its opinion and modify its judgment to make clear that the challenged orders were invalid and of no effect that Transit was entitled to restitution, and for other relief (R. 1351). The Commission and Pepco filed their answer to this motion on January 4, 1954 (R. 1362), and Transit filed its reply to this answer on January 11, 1954 (R. 1378).

On February 25, 1954, the Court of Appeals issued its order on Transit's motion modifying its judgment of December 10, 1953, to read in pertinent part as follows (R. 1391):

> ". . . it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be . . . reversed, . . . and that this cause be . . . remanded to the said District Court with instructions to enter a judgment:
>
> "(1) directing Potomac Electric Power Company immediately to segregate on its accounts all amounts collected from the Capital Transit Company by reason of the rate increase authorized by Orders No. 3762 and 3774 . . . without obligation to pay the same

to Capital Transit Company unless and until required to do so as a consequence of further order or proceedings pertaining thereto;

"(2) directing that henceforth Capital Transit Company, on such dates as the rate increase would be paid if the amount thereof were finally determined to be due, segregate on its accounts amounts equivalent to the said increase, without obligation to pay the same to the Potomac Electric Power Company unless and until required to do so as a consequence of further order or proceedings pertaining thereto; and

"(3) remanding the case to the Commission for further proceedings in accordance with the opinion of this Court dated December 10, 1953.

"It is FURTHER ORDERED by the Court that in all other respects the motion to clarify and modify the judgment of this Court be . . . denied, without prejudice to renewal of such matters by appropriate proceedings in the District Court *in the event further proceedings therein are had after proceedings before the Commission on remand in accordance with subparagraph (3) above.* (Emphasis supplied.)

In statements accompanying the order, Chief Judge Stephens and Judge Fahy characterized the orders as "erroneous" (R. 1393, 1398). In addition, Chief Judge Stephens was of the view that the question of restitution should be left for the District Court to determine (R. 1394-1396).

SPECIFICATIONS OF ERRORS URGED

(1) The Court of Appeals, in violation of the governing statute (Section 43-705, *infra*, p. 42), failed to direct the District Court to set aside the erroneous orders of the Commission as invalid.

(2) The Court of Appeals erred in ordering the District Court to remand the case to the Commission for further findings of fact when Section 43-705 of the D.C. Code (1951) specifically provides: (1) that the District Court "shall either dismiss the . . . appeal and affirm the order

. . . or sustain the appeal and vacate . . . the Commission's order"; and (2) that the District Court may return a case to the Commission only for the purpose of receiving "additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded . . . or upon which the record may contain no substantial evidence."

(3) The Court of Appeals erred in failing to follow the precedents set by the same court, though by a different panel of judges, in an identical case decided only three years prior to the instant decision.

(4) The Court of Appeals erred in not directing the District Court to refund to petitioner the amounts paid by it to respondent Pepco under the color of the erroneous rate increase orders.

(5) The Court of Appeals erred in failing to direct the District Court to enjoin the further collection of the increased rates for electric energy prescribed in the erroneous orders.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below raises novel and important questions concerning: (1) the proper construction of the review provisions of Section 43-705, D. C. Code (1951), and (2) the general scope of judicial review of administrative determinations and the rights of the parties entitled to review.

2. The decision of the court below is in direct conflict with an earlier decision by a different panel of judges of the same Court of Appeals in *Washington Gas Light Co.* v. *Baker*, 188 F. 2d 11 (1950).

3. The decision of the court below in refusing to set aside the erroneous orders is in conflict with many decisions of this Court and with a decision of the Court of Appeals

for the Third Circuit in *Baltimore & O. R. Co.* v. *United States*, 201 F. 2d 795 (1953).

4. The decision of the court below with respect to restitution is in conflict with decisions of this Court in *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134 (1919), and *B. & O. R. Co.* v. *United States*, 279 U.S. 781 (1929).

ARGUMENT

A. NOVEL AND IMPORTANT QUESTIONS CONCERNING THE PROPER CONSTRUCTION OF THE REVIEW PROVISIONS OF SECTION 43-705 D. C. CODE (1951) ARE PRESENTED.

In *District of Columbia* v. *Pace*, 320 U. S. 698 (1944), this Court granted certiorari to resolve important questions concerning the proper construction of the statute (Sec. 47-2404(a), D. C. Code, 1940) governing judicial review of the administrative decisions of the then Board of Tax Appeals of the District of Columbia. The instant case also presents important questions concerning the proper construction of a statute governing judicial review of the orders of an administrative agency of the District of Columbia. But the questions presented by the instant case are not, as were those in the *Pace* case, limited in their scope solely to the District of Columbia. The questions presented by this case, as we shall show in this and succeeding portions of this petition, have significance in the broader context of those principles generally governing judicial review of administrative action.

In this case the Court of Appeals sustained Transit's appeal by finding that Orders No. 3762 and No. 3774 of the Commission were defective, and specifically reversed the judgment of the District Court that held those orders valid. Yet, strangely enough, the Court of Appeals by the express wording of its order of February 25, 1954: (1) prevented the District Court from exercising the only jurisdiction conferred on it over invalid orders of the Commission; and (2) deprived Transit of the fruits of its appeal. And, what

is of equal importance in this case, the Court of Appeals exceeded its jurisdiction by directing the District Court to order the Commission to specifically exercise its administrative powers in accordance with the court's opinion over a matter entrusted to the Commission's discretion by Congress. Each aspect of the court's action raises important questions.

1. Action in Excess of Statutory Jurisdiction

Section 43-705 (*infra*, p. 42) provides that the District Court, upon the conclusion of its hearing upon an appeal from an order of the Commission, "shall either dismiss the . . . appeal and affirm the order . . . or sustain the appeal and vacate the . . . order." No other jurisdiction is given to the District Court after the conclusion of its hearing upon such an appeal. Section 43-705 also provides that any party to an appeal to the District Court may in turn appeal to the Court of Appeals. The jurisdiction conferred upon the Court of Appeals is simply that it "shall thereupon have and take jurisdiction in every such appeal." Furthermore, Section 43-706 (*infra*, p. 44) provides that the judicial review of the Commission's orders shall be limited to questions of law and Section 43-710 (*infra*, p. 44) provides that the method of judicial review set forth in Sections 43-705 and 43-706 shall be exclusive. It is within the framework of this statutory scheme of judicial review that the order of the Court of Appeals directing the District Court to remand the case to the Commission for further proceedings in accordance with the opinion of the Court of Appeals must be judged.

Certainly, the order of the Court of Appeals is not justified by the express jurisdiction conferred upon it by statute. That jurisdiction is merely to review the order or judgment of the District Court on questions of law. Not one word of the statutory language indicates that the review of the Court of Appeals carries with it the right to change, mod-

ify, or expand the limited jurisdiction conferred upon the District Court over orders of the Commission. Nor can it be validly argued, in the circumstances of this case, that the Court of Appeals has jurisdiction under its general equity powers to order the District Court to remand cases to the Commission for further proceedings in accordance with the direction of the Court of Appeals. The provision of Section 43-710 that the method of review provided by Sections 43-705 and 43-706 shall be exclusive precludes such a result. For quite obviously, the method of review provided by Sections 43-705 and 43-706 is not exclusive if the Court of Appeals can draw from the nebulous reaches of its equity jurisdiction the power to direct the District Court to exercise jurisdiction not conferred upon it by these sections.

The truth of the matter is apparent. The statutory language makes it clear that the scope of judicial review of the orders of the Commission is limited to that conferred upon the District Court, the court having the power of review in the first instance. The power given to the Court of Appeals is to review the District Court's exercise of that jurisdiction—not to expand it. This import of the statutory language is confirmed by its legislative history.

Section 43-705 is a codification of legislation enacted in 1935. Prior to that time, the review powers of the courts of the District of Columbia over orders of the Commission, as shown by the decision of this Court in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1923), were not judicial, but legislative in nature, and included sweeping powers of review, such as the power to hold *de novo* proceedings and to substitute their findings of fact for those of the Commission.

Motivated in part by the breadth of appellate review of Commission rulings in the District of Columbia, the Commissioners of the District asked the Congress to enact legislation narrowing the appellate authority of the courts. This narrowing of appellate authority sought by the Com-

missioners and by Mr. Prettyman (now Judge Prettyman), General Counsel of the Commission, was, as we have said, enacted by the Congress in 1935.

A detailed analysis of the reasons for the 1935 revisions in the appellate procedures with respect to the District of Columbia can be found in House Report 665 of the 74th Congress, First Session. That report, which accompanied HR 3462 (the bill which ultimately became Section 705 and the related sections of Title 43 of the District of Columbia Code) reads in part as follows:

> "HR 3462 was transmitted to the Committee with the endorsement of the Commissioners of the District of Columbia . . . Its principal purpose is to simplify the court review of actions of the Public Utilities Commission and *to reduce the duration of litigation arising from such proceedings.*" (Emphasis supplied.)

The report of the House Committee goes on to describe the role of the court under the new bill as being "*to either affirm or vacate the Commission's order . . .*" (Emphasis supplied.)

The Committee Report referred to above contained a letter from Mr. M. C. Hazen, President of the Board of Commissioners of the District of Columbia, setting out the reasons that had led the Commissioners to recommend the proposed legislation which had as its objective the narrowing of the scope of action available to courts reviewing the Commission decisions. As described by Mr. Hazen in his letter, under prior law the reviewing court could "enter such order as in its judgment it may deem proper." Mr. Hazen went on to say: "In the attached draft it is proposed to change the nature of these appeals . . . The Court would . . . either *affirm* or *reverse* the order of the Commission . . . *The Court may not modify but must either affirm or reverse the order or decision of the Commission* in California, Illinois, Missouri, South Dakota, and Utah." (Emphasis supplied.)

Such was the very clear purpose of the legislation that now forms the governing language of the District of Columbia Code. This was borne out by the testimony of the then Corporation Counsel of the District of Columbia,[3] who also served as General Counsel of the Commission. Moreover, the primary objective of the 1935 amendment to the Code was to substitute a judicial review of orders of the Commission for the then existing "legislative" review.[4] Accordingly, the court review was "limited to questions of law, including constitutional questions," and the Commission's findings of fact were "conclusive ... unless ... unreasonable, arbitrary or capricious." (Section 43-706, D.C. Code (1951), *infra*, p. 44). All of the proponents of the proposed legislation pointed to the decision of this Court in *Radio Comm'n.* v. *Nelson Bros. Co.*, 289 U.S. 266 (1932), as setting forth the standards of review. And in that case this Court said:

> "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence

[3] Mr. Prettyman (now Judge Prettyman), testifying on the proposed legislation, said: "This legislation . . . will prevent the utilities from having two bites—two complete de novo trials . . ." Hearings before the Subcommittee on Public Utilities, Committee on the District of Columbia, 74th Cong., 1st Sess., on H.R. 3462, p. 100. And Mr. Roberts, Peoples' Counsel for the District of Columbia, pointing out that the bill would provide for an appropriate type of judicial review, stated: "The court should examine each finding of fact by the Commission to determine whether in detail it was supported by substantial evidence; and if they have found that the Commission has omitted an item and that the Commission as a matter of law improperly construed the facts in reaching its ultimate conclusion, the Court could declare that the Commission's act was null and void . . ." *Ibid*, p. 86.

[4] See Hearings, Procedural Changes Affecting Public Utilities Commission, House of Representatives, Committee on the District of Columbia, Subcommittee on Public Utilities on H.R. 3462, p. 2, 101-102 (1935). *Cf. Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923).

> to the law. It is without the sanction of the authority conferred." (289 U. S. at p. 277.)

Also cited, both in the hearings, and in *Radio Comm'n* v. *Nelson Bros. Co., supra,* was this Court's decision in *I. C. C.* v. *Union Pacific Railroad,* 222 U. S. 541, 547 (1912) where the Court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power."

As can be clearly seen from the foregoing, it was by specific Congressional design, and not by accident, that the jurisdiction of the District Court at the conclusion of its hearing on an appeal from a Commission order was expressly limited to affirmance or vacation of orders of the Commission.

Section 43-705, as we have already said, limits the jurisdiction of the District Court at the conclusion of its hearing of an appeal from an order of the Commission to one of two modes of action: (1) dismissing the appeal and affirming the order, or (2) sustaining the appeal and vacating the order. And we have argued that the jurisdiction of the Court of Appeals is limited to determining which of these two modes of action the District Court may properly exercise in a given case. A prior provision of Section 43-705 provides that the District Court, before the conclusion of its hearing of an appeal from an order of the Commission, may return the case to the Commission for the taking of "additional evidence upon any subject ... concerning which evidence was improperly excluded ... or upon which the record may contain no substantial evidence" and, further, that in such cases the Commission shall make additional findings on the new evidence. Respondents may argue, on a parity of reasoning, that the Court of Appeals could, in a proper case, direct the District Court, even though it had concluded its hearing on an

appeal, to exercise its jurisdiction of returning the case to the Commission for further evidence. But such a result, even if conceded for the purposes of argument, would not change the result in this case.

The directions contained in these two statutory provisions on the jurisdiction that the District Court shall exercise in cases involving error by the Commission are: If the errors consist solely in improper exclusion of evidence or lack of substantial evidence, the District Court may send the case back to the Commission for further evidence and findings before it finally determines the appeal. On the other hand, if the errors are based either in part or wholly on considerations other than improper exclusion of evidence or lack of substantial evidence, the appeal must be sustained and the order vacated. The only other possible construction of these statutory provisions is that the District Court, if it finds that the error of improper exclusion of evidence or lack of substantial evidence, must return the case to the Commission for further evidence and findings on the subjects involved in these errors even though there are other errors, not involving exclusion of evidence or lack of substantial evidence, that would require the order to be set aside in any event. Obviously, Congress intended no such absurd result.

In the present case, the Court of Appeals found the Commission orders erroneous on three issues. On none of the issues was the error improper exclusion of evidence. On only one of these three issues (rate of return) was the basic error found to be lack of substantial evidence. As to the other two issues (power to fix rates on a system basis and lack of adequate findings on amount of increase to Transit), the errors were found to lay neither in improper exclusion of evidence nor in lack of substantial evidence, but solely in the failure to make proper findings. Therefore, the controlling and significant consideration is that the Court of Appeals, on two issues, held the orders of the Commission deficient for

reasons that did not bring into operation the jurisdiction of the District Court to return the case to the Commission for taking additional evidence. It is the jurisdiction that the District Court could exercise, under the statute, in this situation that must control. And the scope of the limited jurisdiction available in such a situation is plain: sustain the appeal and vacate the orders.

In the present case the Court of Appeals, in seeking a middle ground between the only two courses of judicial review, i.e., affirmance or vacation of the Commission's orders, has acted in excess of the authority which is conferred on it by the Congress. The question posed by the action of the Court of Appeals involves not only the proper application of the judicial review provisions of Section 43-705. More important, it also involves in essence, the proper application, in administrative proceedings, of the judicial review provisions of all Congressional statutes that limit the scope of such review to deliberately chosen and explicitly delineated modes of judicial action. For if the decision of the Court of Appeals is permitted to stand, it furnishes precedent for the judicial expansion of the jurisdiction of courts in the review of administrative orders beyond that intended by Congress. This action on the part of the Court of Appeals should, therefore, be reviewed and reversed by this Court.

2. Nullification of Statutory Right to Judicial Review

The Court of Appeals in its opinion pointed out the errors made by the Commission in its Orders No. 3762 and No. 3774. Then in its order of February 25, 1954, it told the District Court for all practical purposes to limit its exercise of jurisdiction on remand to returning the case to the Commission with directions to take further action in accordance with the court's opinion. The effect of this action taken by the Court of Appeals is to prevent Transit from recovering on this appeal any part of the increases in rates which it had paid or would pay under the invalid

orders. For it is clear, when the court's order of February 25, 1954, is read in the context of Transit's motion for clarification and the court's decision, that the court has ruled that Transit may not, on this appeal, recover any of the increases in rates that it has paid under the invalid orders nor be relieved of the liability of paying those increases in the future if the Commission in 1954, or thereafter, takes steps to correct the errors in its orders pointed out in the court's opinion.

Transit has thus been deprived of any benefits of the judicial review that Congress specifically entitled it to under the provisions of Section 43-705. Instead of gaining such benefits—the right to recover past payments and the right to be freed from future liability—it finds after seeking for three years to establish its right to those benefits that it is faced with the blunt fact that it has not gained them and the prospect that it will never gain them should the Commission be astute enough to follow the Court of Appeals' directions for retroactively rehabilitating the invalid rate orders. And in all probability if the court's action is permitted to stand, Transit is faced with the certainty of a second series of appeals from the rehabilitated orders before it could be finally determined whether it is to recover payments already made and relieved from liability for future payments. In other words, Transit would be faced with two appeal proceedings to gain what it is clearly entitled to by one appeal.

Being thus deprived of the benefits of its appeal is, of course, a serious matter to Transit. But the importance of the questions raised by the action of the court in this case transcends any effect on Transit. The action of the court, if permitted to stand, effectively nullifies the right to judicial review given in Section 43-705 to all rate-payers who wish to contest the validity of rate increase orders of the Commission. And, by the same token, it furnishes an example for the judicial nullification of the right to judicial review given to rate-payers who wish to test, under Con-

gressional statutes permitting such review, the validity of the orders of federal rate making bodies. That the action of the Court of Appeals would have this far-reaching result—unless it is reversed by this Court—is certain. It is difficult to imagine that any rate-payer would want to take the lengthy and costly proceedings necessary to the judicial review of an order increasing rates if all he can achieve upon establishing the invalidity of the order is an advisory opinion of the reviewing court informing the rate-making body of the steps it can take to correct its errors and thereby insure that the rate-payer can never recover any of the illegal rates paid under the invalid order.

The judicial nullification of the provisions of Section 43-705 and similar statutes would have the further grave consequences of defeating one of the principal methods devised by Congress to prevent administrative absolutism. It is well-known that Congress devised such statutes so that economic interests of persons affected by administrative orders would compel them to seek judicial review of such orders and thus insure, through such review, that administrative agencies act only within the bounds of authority conferred upon them. Needless to say, this economic interest that Congress relied upon as the motivating force for keeping administrative agencies within the bounds of their authority cannot, in rate-making cases, play the part designed for it if the courts, through such action as that of the Court of Appeals in this case, instead of according the rate-payer who establishes the invalidity of a rate order the economic benefits of his appeal, actually leave him with an economic penalty—the cost of his litigation.

The far-reaching effect that the action of the Court of Appeals in this case would have on the judicial review provisions of Section 43-705 and similar statutes is of itself sufficient reason to call for review and reversal by this Court.

3. Improper Exercise of Judicial Authority

This Court in *Federal Comm'n.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), had occasion to admonish this very same Court of Appeals on the limits of the authority that a reviewing court could exercise over administrative proceedings brought before it for review. In that case, which arose under a statute limiting (as does Section 43-706) judicial review of action of an administrative agency to questions of law, this Court held that a reviewing court, while it has jurisdiction to rule on the questions of law presented, did not have jurisdiction to direct what administrative disposition the agency could make of the proceedings after the case was remanded to it. In this case, however, the effect of the opinion of the Court of Appeals and its order of February 25, 1954, was to point out to the Commission just what administrative disposition should be made of the proceeding: the Commission should hold further proceedings on Pepco's 1950 application for rate increases and, in light of the instruction gained from the court's decision, produce an order that would establish in 1954 rates that were just and reasonable as of 1951.

It could very well be—indeed, it would be subject for comment if it were not so—that the Commission, if left free to exercise its administrative discretion in the matter, would conclude that the proper course for it to take in view of the invalidity of its 1951 orders would be the dismissal of Pepco's 1950 application with leave to it to file a new application based upon the economic conditions of 1954. But the Court of Appeals, just as it attempted in the *Pottsville* case to prevent the Federal Communications Commission from taking administrative action of a legislative character on the Pottsville application in light of the changes which had taken place while that case was formerly before the Court, now attempts in this case to prevent the Commission from basing administrative action upon Pepco's 1950 application in light of the changes that

have taken place while the present case was before the courts. This attempt of the court to shackle an administrative agency in the exercise of a power essentially legislative to the conditions of a given time and situation in the past ignores, just as it did in the *Pottsville* case, the fact that the administrative exercise of powers that are essentially legislative in nature—such as the power to determine public convenience and necessity or the power to set rates for the future—must perforce be exercised prospectively, in terms of the past and present, and not retrospectively in terms of the past alone.

The unjustified interference with the administrative process that would result if the instant decision of the Court of Appeals is permitted to stand is exactly the same type of interference that this Court attempted to prevent by its decision in the *Pottsville* case. And the instant case affords proof that the Court of Appeals once more has disregarded the proper balance between judicial review and administrative action. This Court should, therefore, in the interest of the proper administration of the law, review and reverse this aspect of the Court of Appeals' decision and judgment.

B. THE COURT BELOW ERRED, SINCE NEITHER THE COURT NOR THE PUBLIC UTILITIES COMMISSION POSSESSES THE AUTHORITY TO REHABILITATE, IN 1954 OR THEREAFTER, THE COMMISSION'S ERRONEOUS RATE INCREASE ORDERS OF 1951.

Under Section 43-411, D. C. Code (1951), the Commission is granted authority "to determine and by order fix and order to be substituted . . . [for unjust, unreasonable or discriminatory rates] such rate or rates, tolls, charges, or schedules as shall be just and reasonable." There is no grant of power or authority given by Congress to the Commission to fix retroactive rates. In the absence of such express authority, this Court has been reluctant to grant such broad power to an administrative agency. See *T.W.A.* v. *Civil Aeronautics Board*, 336 U. S. 601 (1949).

Indeed, the Court of Appeals for the District of Columbia Circuit has held that there is an "almost conclusive presumption against the power to take retroactive action unless Congress plainly specifies this power." *Neild* v. *District of Columbia*, 110 F. 2d 246, 254 (1940); *Transcontinental & West. Air* v. *Civil Aeronautics Bd.*, 169 F. 2d 893, 894 (1948).[5]

Yet, despite its holding in these earlier cases, the Court of Appeals has, in effect, directed the Commission to take further evidence and make new findings which will result

[5] It is an accepted principle of statutory construction that "Statutes are not applied retroactively unless Congress . . . so provides either expressly or by implication . . ." Stimson, Retroactive Application of Law—a Problem in Constitutional Law—38 Michigan Law Review 30, 31. This article by Stimson deals with "the extent to which the United States Constitution is a bar to the retroactive application of law, either judgment or statutory". 38 Mich. L. Rev. 30, 31. See, in particular the discussion of "The Due Process Clauses" beginning at page 33. And see also Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398, 411-412, where the following statement appears: "The Treasury should be held to have no power to amend a legislative regulation retroactively . . . retroactive tax legislation is usually unwise and unfair no matter what its constitutionality may be . . . where extreme measures are called for—and retroactivity is an extreme measure—we may well require that Congress itself should exercise the power." And see also, to the same effect, Smead, the Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence—20 min. L. Rev. 775, where the following statement appears at 780-781: "The United States Supreme Court has stated expressly that retroactive legislation would not be favored, that such laws were contrary to American jurisprudence, and that this Court, in the absence of an express command, or 'necessary implication' to the contrary, will presume that a law is designed to act prospectively." (This article, in a lengthy footnote at page 781, collects a large number of decisions in support of the foregoing statement).

To the same effect also, see Davis, Administrative Law, pages 211, 212, 213:

> "Due process prevents retroactive legislation deemed unreasonable . . .
>
> "Agencies have no powers except those conferred and power to issue retroactive rules is not easily implied . . . Because retroactivity is not favored, a reasonable initial view is that retroactive rules should be tolerated only when specifically authorized by statute."

in an order in 1954, or later, fixing and determining rates for years beginning in 1951. This is clearly retroactive rate making in its most flagrant form. Such action finds no sanction under the Commission's statutory rate making powers and is contrary to the developed concepts of administrative procedure. In *Montana-Dakota Co.* v. *Pub. Serv. Co.*, 341 U.S. 246, 254 (1951), the majority of this Court, speaking through Mr. Justice Jackson, said:

> " . . . But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. . . "

However, if the Court of Appeals' order of February 25, 1954, stands, it is clear that it has referred to the Commission an issue which it would not have jurisdiction to determine.

In his dissenting opinion in the *Montana-Dakota* case, Mr. Justice Frankfurter made clear his position that the Federal Power Commission did not have authority to fix retroactive rates. He stated that while under the provisions of the Power Act the Commission could look into past rates, such an inquiry could not be made the basis for an administrative award for damages. He concluded:

> "But this does not authorize the Commission to fix rate orders retrospectively. The Commission may establish rates only 'to be thereafter observed and in force' . . . " (341 U.S. 246, 260-261.)

Rate making powers of administrative agencies operate prospectively unless there is a clear statutory direction that they are to operate retroactively, *T.W.A.* v. *Civil Aeronautics Board, supra,* 605.[6] Since the Commission

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[6] Examples of such retroactive legislation may be found in the rate fixing powers conferred upon the Civil Aeronautics Board and the Interstate Commerce Commission dealing with the rates to be paid carriers for transporting the mails. 52 Stat. 998, 49 U.S.C. § 486 (a); 39 Stat. 430, 39 U.S.C. § 551.

has no authority to fix rates retroactively, the Court of Appeals erred when it directed the Commission to take further evidence and make new findings to support rates for 1951 and the years following in 1954 or thereafter. This Court should grant this petition and reverse this decision of the Court of Appeals since it is in conflict with the decisions of this Court cited above.

Moreover, this Court should grant this petition and decide the question whether, under the statutes governing this Commission's rate fixing powers and similar statutes, an administrative agency is authorized to determine the proper rates for past years when it fixes rates only for the future. This question was presented to this Court in *Power Comm'n.* v. *Hope Gas Co.*, 320 U.S. 591 (1944), where the Circuit Court of Appeals, Fourth Circuit, had held that the Federal Power Commission, which had power to fix prospective rates only, was not authorized to determine the proper rate of return for past years. This Court there found that these findings were not reviewable since the Company was not aggrieved by the findings, i.e., that the findings would affect its right only on the contingency of future administrative action. Therefore, this Court did not pass on the question whether such a practice was justified under statutes which grant power to fix prospective rates only.[7] This question is now presented to this Court in a form which is both subject to review and ripe for determination. Furthermore, an order of a court authorizing an administrative agency to fix rates for the past while setting rates for the future conflicts with the

[7] Cf. *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 103 F. Supp. 666 (D.C. Montana, 1951), p. 670: "It would seem that the Federal Power Commission had no authority to make findings as to the unreasonableness of past rates, and that its authority in this respect is limited solely to the determination of rates to be in force and to apply to future transactions . . . The court . . . has been unable to find authority for either court or commission to determine reasonableness of past rates." It should be borne in mind that Congress did not give the respondent Commission jurisdiction to award reparation.

well known principle of rate making enunciated by this Court in *Board of Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 31-32 (1926), that profits or losses of the past cannot be used to determine rates for the future.

C. THE DECISION OF THE COURT BELOW IN REFUSING TO ORDER THE DISTRICT COURT TO RESTORE TO TRANSIT THE AMOUNT OF THE RATE INCREASES PAID BY IT TO PEPCO AFTER THE ERRONEOUS JUDGMENT OF THE DISTRICT COURT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

When the District Court entered its judgment affirming the Commission's orders, Transit was, of course, required to continue paying the increase in rates authorized by the orders as long as the judgment of the District Court was unreversed. But when the Court of Appeals reversed the judgment of the District Court, Transit, on the facts of this case, was entitled to have restored to it all that it had lost as a result of the erroneous judgment of the District Court. This Court, in *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134 (1919), referred to the equitable principle requiring this result as:

> "* * * the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." (249 U.S., p. 145.)

This Court has expressly applied this equitable principle of restitution in a case involving the judicial review of an administrative order invalid for substantive error.

In *B. & O. R. R.* v. *United States*, 227 U. S. 291 (1928), this Court reviewed a District Court judgment affirming an order of the Interstate Commerce Commission requiring certain eastern railroads to pay the cost of transferring freight between their terminals and terminals of various railroads. After the District Court affirmed the

I.C.C. order, the eastern railroads, who then began paying the transfer charges, appealed to this Court. Upon the appeal, this Court reversed the judgment of the District Court. In so doing, the Court held that the I.C.C. order was invalid because of a misinterpretation of a substantive rule of law and because of the lack of substantial evidence on the controlling issue (the proper apportionment of a combination rate).

When the mandate of this Court reached the District Court, the eastern railroads asked that the western railroads be required to pay them the transfer costs that they had paid since the entry of the judgment of the District Court affirming the order of the I.C.C. The District Court denied restitution. On appeal, this Court, on the authority of the *Arkadelphia* case, *supra*, and similar cases, held that the eastern railroads were entitled to restitution, saying:

> "The east side roads are entitled to restitution. The order should have been set aside in the first instance. As a result of the erroneous refusal of the court, the burden of the transfer charges in question was shifted from the west side roads to the east side roads and was by them borne until the order was set aside on the reversal of the decree dismissing the bill. * * *
>
> "The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done." (*B. & O. R. Co.* v. *U. S.*, 279 U.S. 781, 785-786 (1929).

The operative facts of the *B. & O. R. Co.* case and the present case are so similar, and the results so opposed, that the decision of the Court below in this case necessarily conflicts with the decision of this Court in the former case. In both cases administrative orders were held valid by a District Court. As a consequence, the persons affected by the administrative orders were required to make money

payments under the orders. In both cases it was determined on appeal that the orders were based upon an improper interpretation of law by the administrative agency and that the record made before it contained no substantial evidence on controlling issues. Thus, the same basic pattern appears in both cases. This Court, when faced with the pattern, concluded that the equities governing restitution required that the District Court be directed to order restitution of the monies paid out as a result of its erroneous affirmance of the administrative order. But the court below, when faced with the same pattern, directed the District Court to take action that prevented it from ordering restitution of the monies paid out by Transit as a result of that court's erroneous judgment.

Evidently, the majority of the Court of Appeals concluded that the decisions of this court in *Atlantic Coast Line* v. *Florida,* 295 U.S., 301 (1935), and *United States* v. *Morgan,* 307 U.S. 183 (1939), precluded restitution. This conclusion, in view of the basic similarity between the instant case and the *B. & O. R. Co.* case, can be warranted only if the latter was overruled by the *Atlantic Coast Line* and *Morgan* cases. That this was not done is clear. In both the *Atlantic Coast Line* case and the *Morgan* case, this Court cited with approval the general equitable principle of the *B. & O. R. Co.* case; that is, that a party, upon the reversal of an erroneous judgment affirming an administrative order, invalid for substantive error, is entitled to recover what he has lost as a result of that judgment. In both of the cases, however, the Court pointed out a limitation on this principle; namely, that restitution will not be granted where it will turn the process of a court of equity into an "instrument of injustice" (*Morgan* case, 307 U.S. at 198). But the considerations that led this Court to apply this limitation on the principle of restitution in those cases are not present in this case.

In the *Atlantic Coast Line* case and the *Morgan* case, the errors in the rate orders that led to the reversal of the judgments affirming them were "procedural defects"

(307 U.S. at 196) or "defects in ... form" (295 U.S. at 311). In the instant case, however, there were errors in the rate orders that were substantive—lack of substantial evidence and misinterpretation of a substantive rule of law. It is the fact that the Commission's orders were in part predicated on substantive errors that brings this case within the decision of the *B. & O. R. Co.* case and distinguishes it from the *Atlantic Coast Line* and *Morgan* cases. The proper rule to be deduced from these two cases is clear. When a judgment affirming a rate order has been reversed on appeal solely because of a procedural defect in the administrative proceeding, restitution will not be granted if the substantial evidence of record and the controlling substantive law show that the result reached in the rate order was proper and that an order of restitution would result in the violation of private rights and contravention of statutory commands.

This rule can have no application in the instant case. Here the errors underlying the Commission's rate orders were not solely procedural slips or formal defects. Not only did the Commission err through its failure to make necessary and basic findings, but its errors also included lack of substantial evidence and failure to apply a proper rule of substantive law. Even if the procedural defects are ignored, and the substance of the case made before the Commission alone considered, it cannot be shown that Pepco was entitled as a matter of substance to a rate increase or that, should restitution be granted, there would be a violation of any private rights or of any statutory command. The rule applicable to this case comes from the *B. & O. R. Co.* case: If the error underlying an administrative order concerns matters of substance, a person affected by the order may, upon the reversal of an erroneous judgment affirming the order, have restored to him all that he lost as a result of the erroneous judgment. Since the result reached by the Court of Appeals in this case clearly conflicts with the controlling rule of the *B. & O. R. Co.* case, this Court should review and reverse the judgment of the Court of Appeals.

D. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH ITS EARLIER DECISION IN WASHINGTON GAS LIGHT CO. v. BAKER, 188 F. 2d 11 (1950).

It is indeed rare that one panel of a court of appeals will, in reviewing the complex issues of a rate case, find that another panel of the court has, in a case presenting substantially similar facts and decided but three years previously, determined an issue controlling the disposition of the pending case. And it would be rarer, we should think, that the panel presiding in the pending case would, in such circumstances, reach a result diametrically opposed to that reached by the other panel in the prior case. Especially is this so when the opposed results are reached by the panel presiding in the pending case without raising a distinction between the two cases or overruling the prior case. Yet, when the decision and judgment in the instant case is compared with the decision and judgment in *Washington Gas Light Co.* v. *Baker,* 188 F. 2d 11, it is obvious that just this has happened.

In the *Washington Gas Light* case, a panel of the Court of Appeals (Edgerton, Bazelon, and Fahy, JJ.) reviewed an order of the Commission increasing the rates for gas services in the District of Columbia. On the important issue of a rate of return,[8] this panel found that the record and the Commission's findings were deficient in several material particulars. This panel pointed out the nature of the deficiencies in the record and in the Commission's order on rate of return in language impossible to misinterpret. It then went on to rule:

> "We hold that the Commission's order is *invalid* because of the inadequacy of the record and findings

[8] The other principal issues in the *Washington Gas Light* case, *supra,* abandoned property and stand-by plant, did not find their counterparts in the instant proceeding. However, the basic vice in the orders of the Commission on these two issues was the failure to make proper and necessary findings—a failure which was repeated in the instant case on the issues of allocation and the amount of the increase to Transit.

> with regard to rate of return, abandoned property and the stand-by plant. * * * " (188 F. 2d at 23; emphasis supplied.)

Consistently with this holding, the panel presiding in that case affirmed the judgment of the District Court setting aside the Commission's order and, in addition, ordered the Washington Gas Light Company to refund to its customers *all* of the increases in rates that it had received under the invalid order.

In the present case, brought to test the validity of orders of the Commission increasing electric rates in the District of Columbia, a different panel of the Court of Appeals (Stephens, C.J., and Miller and Fahy, JJ.) held that the record before the Commission and the Commission's orders were deficient on rate of return in exactly the same material particulars that they had been deficient in the *Washington Gas Light Co.* case. But, despite this, the panel in the present case, though specifically requested to do so by Transit, refused to hold the orders of the Commission invalid or to direct Pepco to refund any of the increases in rates that it had received under those orders.

A more direct conflict in result than that presented by the decisions and judgments of these two panels of the Court of Appeals could hardly be imagined. But both cases presently stand as precedent for the disposition of future cases. For as we have stated, the panel presiding in the instant case neither attempted to distinguish nor to overrule the *Washington Gas Light Co.* case. This means that the Court of Appeals is free, on the basis of its own precedents, to reach either of two opposed results in any future case arising on an appeal from rate orders of the Commission. It means at the same time that rate payers affected by future orders of the Commission can have no way of determining which of two controlling but absolutely opposed precedents—one inviting, the other discouraging appeals—should be relied upon. A conflict

having such consequences reduces the application of precedent to the level of mere chance, and, in so doing, stultifies the judicial process. Such a conflict should be resolved by this Court. *Dickenson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950); *John Hancock Ins. Co.* v. *Bartels*, 308 U.S. 180 (1939).

A parallel consideration is also of importance. Equal justice under law is the guiding tenet of our law. Mr. Justice Cardozo expressed the content of this principle in these words:

> "'If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff...' Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts..." (*The Nature Of The Judicial Process* (1921) pp. 33-34.)

Here, the two cases are the same. But in result, they were decided on opposite principles. If the rate payers in the *Washington Gas Light* case were accorded justice, the rate payer in the present case was not; if the utility in the present case was accorded justice, the utility in that case was not. And as long as the conflict between these two decisions of the Court of Appeals remains unresolved, with each retaining the force of controlling precedent for future cases, there can be no assurance that there be an "even-handed administration of justice" by the Court of Appeals. This Court should, therefore, resolve this conflict in the interest of the proper administration of justice.

E. THE DECISION OF THE COURT BELOW IN REFUSING TO VACATE OR SET ASIDE THE ORDERS OF THE COMMISSION IS IN CONFLICT WITH MANY DECISIONS OF THIS COURT AND WITH THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IN BALTIMORE & O. R. CO. v. UNITED STATES, 201 F. 2d 795 (1953).

This Court on many occasions has held that the failure of an administrative agency to make adequate findings of fact renders its order or determination invalid. In *Florida* v. *United States,* 282 U.S. 194 (1931), this Court set aside an order of the Interstate Commerce Commission because of the lack of "the basic or essential findings required to support the Commission's order" (282 U.S. 194, 215). The decision in the *Florida* case, *supra,* was further emphasized in *United States* v. *B. & O. R. Co.,* 293 U.S. 454 (1935), where this Court, speaking through Mr. Justice Brandeis, said:

> "The railroads contend that to support the order certain basic findings are essential; that these were not made; and that, hence, the order is void. *This contention is in our opinion sound.*" (293 U.S. 454, 462; emphasis supplied).

Other decisions of this court are to the same effect. See *Wichita R. & L. Co.* v. *Pub. Util. Comm.,* 260 U.S. 48, 58 (1922); *United States* v. *Chicago M. St. P. & P. R. Co.,* 294 U.S. 499, 504 (1935); *United States* v. *Carolina Carriers Corp.,* 315 U.S. 475, 488-489 (1942); *Yonkers* v. *United States,* 320 U.S. 685, 692 (1944); *North Carolina* v. *United States,* 325 U.S. 507, 520 (1945).

Moreover, the decision of the lower court is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Baltimore & O. R. Co.* v. *United States,* 201 F. 2d 795 (1953). In this case, the Court of Appeals for the Third Circuit considered an order of the Federal Maritime Board ordering the railroads to increase the amount of "free time" allowed for the loading and unloading of freight on their piers. This order had the ef-

fect of reducing the amount of revenue that the railroads could collect for storage of freight at the piers. The order was attacked on jurisdictional and procedural grounds. While sustaining the jurisdiction of the Board to enter the order, the court found that the order was deficient in that there were not sufficient proper findings of fact to enable the court to properly review the controversy. The court therefore, expressly "vacated" the order and returned the case to the Board for proceedings in conformity with its opinion. (201 F. 2d 795, 800)

It is submitted that this Court should resolve this conflict between the decision of the Court of Appeals in the instant case and the cases cited above. The holding of the Court of Appeals, if allowed to remain in effect, produces the incongruous result that an order found to be "erroneous" because its conclusions are unsupported by proper findings of fact still may be used as the basis for collecting increased rates for electric energy, not only for the period prior to the court's determination of basic defects in the order, but also for the period following that determination, until a proper order has been issued. Such a result renders judicial review of administrative orders a useless thing since, although the orders, under all controlling precedent, be invalid, they still have the same effect as if they were valid.

F. IT IS NOT PREMATURE FOR THE SUPREME COURT TO REVIEW THE CASE AT THE PRESENT TIME.

Respondents will undoubtedly argue that certiorari should not be granted at this time, because, theoretically, further proceedings before the Commission are still pending.

It is not premature for this Court to grant certiorari at the present time. The parties to this litigation should not be required to go through the wholly futile steps of further proceedings by the Commission, further reviews by the District Court and the Court of Appeals, and an ulti-

mate ruling that all such further proceedings, with respect to rates for the years 1951, 1952, 1953 and 1954 to date, are illegal and wholly nugatory. Rather than requiring the parties to go through these time-consuming and wholly unnecessary steps, this Court should grant certiorari and should rule on the case on the merits, in order to make it clear that, whatever the Commission may now do with respect to the *future,* it cannot, under the facts of this case, legally set rates for the *past.*

In the case of *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428 (1923), electric power rates for the District of Columbia set by the Commission had been set aside by the Court of Appeals, and the matter had been remanded to the Commission for further proceedings. (261 U. S. 428, 437). Notwithstanding the pendency of these further proceedings before the Commission, this Court took jurisdiction over the case, because of the importance of the issues posed, and because, in particular, of the issue with respect to "the nature of the power [of review] thus conferred on the District Supreme Court." (Chief Justice Taft, writing for a unanimous Court, 261 U.S. 428, 440).

Similarly, in *Hope Natural Gas Co.* v. *Federal Power Commission,* 134 F. 2d 287 (1943), certiorari granted 319 U. S. 735, the Court of Appeals for the Fourth Circuit had entered an order in the following words: "the order of the Commission will be set aside and the cause will be remanded for further proceedings" (134 F. 2d 287, 312).

In this posture of the case, and notwithstanding the remand to the Commission for further proceedings, this Court granted certiorari. (319 U.S. 735).

In this Court's subsequent opinion on the merits, the Court stated:

> "The cases are here on petitions for writs of certiorari which we granted because of the public importance of the questions presented." (*Power Comm'n* v. *Hope Gas Co.,* 320 U.S. 591, 594 (1944)).

And Mr. Justice Reed, while dissenting on other aspects of the case, adverted to the importance of the proceeding in the following words:

> "Added importance arises from the obvious fact that the principles stated are generally applicable to all federal agencies which are entrusted with the determination of rates for utilities." *Id.*, at 620

Within the context of this Court's decisions in the *Keller* case and the *Hope Natural Gas Company* case, it is clear that it would not be premature for this Court to grant certiorari in this case at this time.

CONCLUSION

It is respectfully submitted, therefore, that certiorari should be granted at this time, and the decision of the court below should be reviewed and reversed on the questions raised in this petition.

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APPENDIX.

Excerpts From the District of Columbia Code, 1951 Edition.

The pertinent provisions of the District of Columbia Code, 1951 Edition, dealing with utility regulation, are set forth below:

§ 43-323. Schedule of rates to be filed—Existing rates to remain in force until changed.

Every public utility shall file with the commission, within a time to be fixed by the commission, schedules, which shall be open to public inspection, showing all rates, tolls, and charges which it has established and which are in force at the time for any service performed by it within the District of Columbia, or for any service in connection therewith or performed by any public utility controlled or operated by it. The rates, tolls, and charges shown on such schedules shall not exceed the rates, tolls, and charges allowed by law on March 4, 1913, and shall be the lawful rates, tolls, and charges within the District of Columbia, and shall remain and be in force until set aside by the commission. (Mar. 4, 1913, 37 Stat. 981, ch. 150, § 8, par. 24.)

§ 43-401. Existing rates continued—Schedules to be filed—Application to change rates—Review of ruling by District Court.

First, unless the commission shall otherwise order, it shall be unlawful for any public utility within the District of Columbia to demand, collect, or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service under the law in force on March 4, 1913; second, every public utility in the District of Columbia shall, within thirty days after March 4, 1913, file in the office of the commission copies of all schedules of rates and charges, including joint rates, in force on March 4, 1913; third, any public utility desiring to advance or discontinue any such rate or rates may make application to the commission in writing, stating the advance in or discontinuance of the rate or rates desired, giving the reasons for such advance or discontinuance; fourth, upon receiving such application the commission shall fix a time and place for hearing, and give such notice to interested parties as shall be proper and reasonable; if, after

such hearing and investigation, the commission shall find that the change or discontinuance applied for is reasonable, fair, and just, it shall grant the application, either in whole or in part; fifth, any public utility being dissatisfied with any order of the commission made under the provisions of this section may commence a proceeding against it in the District Court of the United States for the District of Columbia in the manner as is in chapters 1-10 of this title provided, which action shall be tried and determined in the same maner as is in chapters 1-10 of this title provided. (Mar. 4, 1913, 37 Stat. 994, ch. 150, § 8, par. 94.)

§ 43-408. Commission may investigate unjust discriminatory rates—No order to be entered without formal hearing.

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or that any time schedule, regulation, or act whatsoever affecting or relating to the conduct of any street railway or common carrier, or the production, transmission, delivery, or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telegraph or telephone message, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the commission without a formal hearing. (Mar. 4, 1913, 37 Stat. 983, ch. 150, § 8, par. 38.)

§ 43-411. Reasonable rates may be ordered—Notice to be given utility affected thereby.

If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of chapters 1-10 of this title, the commission shall have power to determine and by order fix and order to be sub-

stituted therefor such rate or rates, tolls, charges, or schedules as shall be just and reasonable. If upon such investigation it shall be found that any regulation, time schedule, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this section, or if it is to be found that reasonable service is not supplied, the commission shall have power to determine and substitute therefor such other regulations, time schedules, service, or acts and to make such orders respecting and such changes in such regulations, time schedules, service, or acts as shall be just and reasonable. And upon any investigation for the purpose of determining upon and requiring any reasonable extension or extensions of lines or of service that shall promise to be compensatory within a reasonable time, the commission shall have power to fix, determine, and require every such extension or extensions to be made and the terms and conditions upon which the same shall be made: *Provided*, That no hearing shall be had and no order shall be made respecting such extension or extensions, without notice to the public utility affected thereby, as provided in section 43-410. (Mar. 4, 1913, 37 Stat. 983, ch. 150, § 8, par. 41.)

§ 43-704. Application to District Court for instructions—Application for reconsideration.

If at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of chapters 1-10 of this title, they are authorized and empowered to institute a proceeding in equity in the District Court of the United States for the District of Columbia petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action.

Any public utility or any other person or corporation affected by any final order or decision of the commission may, within thirty days after the publication thereof, file with the commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility or other person or corporation shall

in any court urge or rely on any ground not so set forth in said application. The commission, within thirty days after the filing of such application, shall either grant or deny it. Failure by the commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted, the commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application: *Provided*, That upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined.

§ 43-705. Appeal to District Court from certain orders—Precedence over other civil causes—Proceeding when additional evidence proper—Statement to accompany decision—Subsequent appeals—Commission not liable for costs or damages.

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the

application for reconsideration and the orders entered thereon: *Provided,* That the parties, with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District Court of the United States for the District of Columbia shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any super-

sedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States. (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, § 2.)

§ 43-706. Appeal limited to questions of law.

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious.

§ 43-710. Method of review exclusive.

The method of review of the orders and decisions of the Commission provided by paragraphs 43-704 to 43-709, herein, shall be exclusive.

§ 43-911. Commission may regulate unreasonable and discriminatory rates and fix new rates.

Whenever, after hearing and investigation as provided in chapters 1-10 of this title the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in chapters 1-10 of this title. (Mar. 4, 1913, 37 Stat. 992, ch. 150, § 8, par. 88.)

BRIEF IN OPPOSITION
to
PETITION FOR CERTIORARI

In reviewing the affirmance of a rate order of the Public Utilities Commission of the District of Columbia, the Court of Appeals decided substantive issues of general importance that are presented to this Court in No. 750, *Potomac Electric Power Company, Petitioner* v. *Capital Transit Company, Respondent*. The most important is the question whether an administrative agency, in increasing the rates to be charged within its jurisdiction by an electric utility operating in a single metropolitan area which is traversed by State lines, may, in accordance with its practice of 25 years, make such rates on the basis of actual system-wide figures without inquiry into theoretical local costs. That issue arises, in varying degree, wherever a system crosses a State line.

But the question raised by Capital Transit Company in No. 740, which seeks review of the same decision on procedural grounds, has no such novel quality. It has already been settled by decisions of this Court, with which the judgment of the Court of Appeals is in accord.

While the Petition presents the question in a four-fold form (pp. 2-3), it is really no more than this: When administrative action is thought by the reviewing court to have taken an erroneous rather than a final turn, may the court remand for further administrative proceedings and reserve judgment on the validity of the order until their completion?

The Court of Appeals below did just this. It remanded to the Commission for further evidence and findings. It reserved judgment on the validity of the rate increase until completion of the administrative process. And it required the segregation *pendente lite* of amounts equal to the rate increase for Transit, this to be done by Pepco as to the amounts previously collected and by Transit as to the

amounts subsequently accruing, which were not to be paid until further order.

This procedure involves no novel question. Repeated decisions of this Court have made the path clear.

The principle was established in *Florida* v. *United States*, 282 U. S. 194 (1931) and 292 U. S. 1 (1934) and (*sub nom. Atlantic Coast Line R.* v. *Florida*) 295 U. S. 301 (1935). In the first appeal the Court held an order of the Interstate Commerce Commission increasing rates to be invalid because of "the lack of the basic or essential findings" (282 U. S. at 215). Subsequently "the Commission upon new evidence and new findings made the same order it had made before" (295 U. S. at 305) and this was sustained by this Court in the second appeal. In the meantime a petition had been filed for refund of the rate increase collected under the original order and in the third appeal this petition was denied on the ground that:

> "The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." (295 U. S. at 309)
>
> " 'Restitution is not of mere right. It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.' " (295 U. S. at 310)

The principle was reannounced in *Morgan* v. *United States*, 298 U. S. 468 (1936) and 304 U. S. 1 (1938) and (*sub nom. United States* v. *Morgan*) 307 U. S. 183 (1939). The first appeal set aside an order of the Secretary of Agriculture reducing rates because the Secretary had given it no personal consideration, accordingly remanding "for further

proceedings in conformity with this opinion" (p. 482), just as was done here by the Court of Appeals. On a second appeal, after testimony by the Secretary as to the scope of his participation, the Court held this still insufficient (304 U. S. at 22). The Solicitor General sought a rehearing on the ground that this Court should give directions for the disposition of the fund collected under the disputed rates. But the Court held it premature to consider such matters until completion of the administrative process, stating that it was remanding the case for further proceedings in accordance with its opinion (304 U. S. at 26). Nevertheless the District Court entered an order permanently enjoining the Secretary's order and directing the refund of the impounded money. But on a third appeal this Court reversed, holding that the Secretary had been left free "to take such further proceedings as the statute permits" and that "justice equally requires the court to await the outcome of the proceedings" (307 U. S. at 187 and 198) before directing any refund in order to be sure that its final action should be in accord with justice.

Later decisions are to the same effect. Thus in the *Chenery Case* this Court reversed a judgment sustaining an order of the Securities and Exchange Commission and remanded to the commission "for such further proceedings, not inconsistent with this opinion, as may be appropriate" (*Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 95, 1943). An order repeating the original determination, on amplified findings, was sustained in *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194 (1947), where the Court summed up the issue in these words:

> "The administrative process had taken an erroneous rather than a final turn." (p. 200)

Similarly in *N. L. R. B.* v. *Virginia Electric and Power Company,* 314 U. S. 469 (1941), this Court reversed a judgment sustaining an order of the Labor Board and remanded ". . . for a redetermination of the issues in the light of this opinion" (pp. 479-80) and an order repeating the original determination, on amplified findings, was sustained (*Virginia Electric and Power Company* v. *N. L. R. B.,* 319 U. S. 533, 539, 1943). Again in *Schwabacher* v. *United States,* 334 U. S. 182 (1948), the Court reversed a judgment sustaining an order of the Interstate Commerce Commission and remanded ". . . for reconsideration under the principles herein expressed" (p. 202) and an order repeating the original determination, on amplified findings, was sustained (*Schwabacher* v. *United States,* 104 Fed. Supp. 875, 1952). These decisions settle the rule that a remand to an administrative agency for amplification of basic findings is not equivalent to vacating its order and has no such effect, but the question of the validity of the rates awaits review of final administrative action when completed.

This rule is part of the broader principle that "the judicial process is not without the resources of flexibility in shaping its remedies" (*Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 622, 1944). As the Court said in *Ford Motor Co.* v. *N. L. R. B.,* 305 U. S. 364, at 374 (1939):

> "Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. . . . If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. . . . Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements."

If there were some unexpected subtlety in the District of Columbia statutes reversing this normal practice, it could not present an issue of general importance. It would be only a local obscurity. But in fact the District of Columbia statutes authorize the reviewing court to require the Commission to receive additional evidence and make additional findings (Code § 43-705, Petition p. 43). This is just what the Court of Appeals directed.

The issues raised by the Petition have, accordingly, been settled by previous decisions of this Court and do not offer any novel aspect meriting review.

But if there are to be further administrative proceedings, their cornerstone must be the legal doctrine that defines the standard of proof, whether the Commission may continue to employ its customary basis of actual system-wide figures or whether it shall be condemned to a theoretical separation of the system into indicated costs of local service. That issue, raised by Pepco in No. 750, governs not only the course of all future proceedings in this case, but of all future proceedings where State lines happen to cross the system that is being regulated. The petition in No. 750 merits review, while the Petition in No. 740, here opposed, should be denied.

Respectfully submitted,

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May 29, 1954.

The undersigned certifies that copies of this Brief in Opposition have this day been deposited in a United States post office or mail box, with first class postage prepaid, addressed to the following:

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HAROLD B. WILLEY, Cle

No. [redacted] 66

In the

SUPREME COURT OF THE UNITED STATES

October Term 1953

POTOMAC ELECTRIC POWER COMPANY,

Petitioner

v.

CAPITAL TRANSIT COMPANY,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR CERTIORARI

Potomac Electric Power Company prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the District of Columbia Circuit reversing a judgment of the District Court which affirmed an order of the Public Utilities Commission of the District of Columbia increasing electric rates. The basic question is of general application to all electric utilities that cross State lines and in such cases governs the whole approach of the administrative agencies in rate making.

OPINIONS BELOW

The opinions of the Court of Appeals are not yet reported. Its original opinions are printed in Volume V of the Record at page 1318 (cited V 1318).* The opinions on motion for rehearing are printed at V 1393.

The opinion of the District Court is reported in 104 F. S. 553. It is printed at III 733.

The opinion of the Public Utilities Commission is reported in 89 P. U. R. (N. S.) 483. It is printed at IV 1111.

JURISDICTION

The judgment of the Court of Appeals was filed December 10, 1953 (V 1350). After motion for rehearing (entitled "Motion to Clarify, *etc.*", V 1351) the judgment was amended by order dated and filed on February 25, 1954 (V 1397). The time for filing petition for certiorari was extended through May 8, 1954, by order of the Chief Justice of the United States dated March 8, 1954.

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*All references are to the record as filed in No. 740, October Term 1953, which is adopted for this Petition.

The jurisdiction of this Court is invoked under §§ 1254(1) and 2101(c), Title 28, U. S. Code and § 43-705, D. C. Code (1951).

QUESTIONS PRESENTED

1. Is the discretionary power of an administrative agency to fix rates within its territory in various classes uniformly throughout an electric utility system without inquiry into differing local costs abolished by the mere circumstance that political boundaries traverse the system, or may all the local commissions, each acting only on rates within its territory, fix uniform rates on the basis of system-wide figures, without inquiry into separate local costs, where finding this justified by a wide range of social and economic factors?

2. Is it sufficient that the Commission record its findings and conclusions in regard to rate of return with enough distinctness so that the path which it followed can be discerned, or must they be recorded in mathematical terms as to each element of cost of capital and other allowances before the resulting order can be sustained?

3. In fixing a particular rate within a general structure, is the Commission entitled to exercise a practical judgment or must it reduce its reasoning to a mathematical formula before its order can be sustained?

STATUTES INVOLVED

The statutes involved are contained in the Appendix hereto. Their most pertinent portion is the standard of review, which is similar to the corresponding provision in most Federal and State statutes:

"In the determination of any appeal from an order or decision of the commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the commission shall be conclusive unless it shall appear that such findings of the commission are unreasonable, arbitrary or capricious." (D. C. Code § 43-706, 49 Stat. 882)

STATEMENT OF THE CASE

The Company is an electric utility that does business only in the Washington metropolitan area. Though this is a single community by social and economic standards, it is traversed by political boundaries. Some 70% of the Company's revenues are collected from customers in the District, 23% in that portion of the metropolitan area that lies in Maryland and 7% in Virginia (IV 1033). The whole service area embraces only 600 square miles. This is a highly concentrated operation. It contrasts with an average of 12,000 square miles for other electric utilities having comparable revenues.* As the Commission found:

> ". . . the population density and urban characteristics of the District of Columbia have extended into the Company's Maryland territory." (IV 1114)

Or in the words of the District Court below:

> "The District of Columbia boundary with recent movements of population becomes very largely a theoretical line, for the metropolitan area of Washington, like the metropolitan areas of many other large cities, is a single unit to all intents and purposes." (III 747)

*The 31 electric utilities with annual revenues exceeding $25,000,000 for which the service areas are shown in Moody's Utilities, 1953.

This essential unity of the metropolitan area is of such importance as to attract continuing Congressional attention to unifying the regulation of public transportation throughout this whole "area which is economically and sociologically unified . . . with no regard for artificial political barriers." (Sen. Rep. Nos. 118 and 504, 83d Cong., 1st Sess. 1953)

The facilities of the Company have been built to serve the whole area as a unit without regard to the political subdivisions. For illustration, it is sufficient to mention the newest generating station. As the Commission found, it was necessitated by increased business in the District and Maryland, but was located in Virginia, outside the Company's service area, in order to obtain the best supply of water (IV 1114). The Company is an integrated system with no more business relation to political boundaries than to parallels of latitude.

Ever since the District Commission was created in 1913, it has regulated the Company's rates in the District on the basis of over-all system-wide figures. It has never attempted any theoretical allocation of separate District costs. The leadership of the District Commission has historically been respected by the two State commissions and each took similar action in the present instance (I 279-280, III 736).

When mounting cost levels made a rate increase necessary in 1950, the District Commission fixed rates by this historical method, acting only as to rates within the District but fixing them on the basis of system-wide figures. In opposition, Transit urged that purely as a matter of law the Commission had no power to fix rates within the District except after first making a theoretical separation of the business so as to attribute portions of the investment and expense to the

District service and the remainder to other service, as if the services had been supplied by two separate companies. The Commission rejected this contention and applied its customary system-wide standard for reasons that can be summarized as follows:

1. The whole service area is a single social and economic community (IV 1114).

2. For a quarter of a century the system-wide basis had been applied without objection (IV 1118).

3. All production facilities of the Company are interconnected by a transmission network constituting "an integrated system" (IV 1115) which serves a territory with comparable "population density and urban characteristics" (IV 1114).

4. Any statistical allocation would, the Commission found, be so theoretical and uncertain as to "result in needless delay and expense without providing any assurance that the over-all results obtained would be equitable to the Company or consumers as a whole" (IV 1118).

5. Even if there be any local variations of cost, the rendering of service in each jurisdiction through the integrated system is "more economical" than by separate systems so that the system-wide basis is the equitable, as well as the effective and realistic, means of regulation (IV 1118).

6. Apart from costs and looking to social factors, "it is desirable" to extend uniform rates throughout the Urban Zone both in Maryland and Virginia (IV 1173).

Finding that on a system-wide basis the Company's return was inadequate to provide for its necessities, the Commission entered an order (IV 1197) increasing the District rates in accordance with schedules which, if applied throughout the system, would yield what it found to be a fair return. The same schedules were later promulgated in Maryland and Virginia by those commissions (III 736).*

Transit as a consumer whose rates were increased appealed to the District Court attacking the Commission's order because not based on a theoretical allocation of properties and costs to separate District service. Jurisdiction over such an appeal had been conferred on the District Court by D. C. Code, § 43-705, 49 Stat. 882. The District Court sustained the Commission's order, saying:

> "From a social and economic standpoint, the use of the entire property of the company as a rate base seems sound. The same power house supplies electric current to customers in the District of Columbia and to customers in Maryland and Virginia. A segregation would be purely artificial and, in part at least, arbitrary." (III 746-7)

Transit appealed. The Court of Appeals reversed on the ground that while it was permissible to look to system-wide results in ascertaining over-all revenue needs, District rates could not be increased without first ascertaining separate costs to the point of establishing that the new rates produce only their "fair share of revenues" (V 1329). In effect the Court holds that separate costs must be ascertained

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*The District contemplated, and Maryland promulgated, schedules that contain a somewhat higher rate in the outermost area, called the Suburban Zone, but this involved only 6% of the business and does not affect the principle. If the District customer cannot object to the same rate in the Urban Zone in Maryland, he cannot object to a higher rate in the Suburban Zone in Maryland.

at the political boundary, no matter how integrated may be the community served or the system serving it. Since no one would dispute a commission's discretionary authority to fix rates within its jurisdiction on the basis of the over-all costs throughout the whole of a political area much larger and more varied than that here involved, as, for example, the State of Virginia, which is served from the Potomac River to West Virginia and North Carolina by a single company at uniform rates fixed on the basis of State-wide costs without consideration of local cost variations, it is plain that the decision of the Court of Appeals is governed by the political boundary alone. In short, the administrative discretion to fix rates for the jurisdictional portion of an integrated system area on the basis of over-all costs without allocation of local costs is, as a matter of law, abolished by the political boundary, even if the commission deals only with rates within its borders and all other commissions approve identical rates. This startling consequence is attributed to the political boundary because "We [the Judges of the Court of Appeals] must be able to say that . . . District consumers do not subsidize the non-District . . ." (V 1325). Whether this must be accepted as the rate-making rule for the future of this Company and others similarly situated is the basic issue in the case.

As secondary issues the Court of Appeals sustained, by divided vote, the contention of Transit that there were insufficient evidence and findings with regard to the rate of return (V 1334) and insufficient findings on the exact extent of the increase to be made in the separate rates of Transit (V 1347). The necessary facts on these two issues are summarized below.

On rate of return, there was extensive testimony by witnesses for the Company, the Commission and the United States. This included comparisons of cost of capital in each

class of securities, analysis of earnings-price ratios, dividend-price ratios, capitalization ratios and financing needs. Reviewing all this testimony, as well as the administrative practice embodied in a recurring rate-making formula that had been applied to this Company for a number of years under the term Sliding Scale, the Commission concluded

> ". . . that 5½% . . . is reasonable and proper for application to the rate base hereinbefore found to be reasonable in this proceeding . . ." (IV 1152)

The majority of the Court of Appeals held this insufficient, saying that the Commission must make basic findings on each constituent element of the cost of capital in each class of security and then make ultimate findings rationally deducible from them so that the judicial mind

> ". . . can decide whether or not the ultimate decision reached by the commission follows as a matter of law from the facts found as its basis, and also whether or not the facts found have substantial support in the evidence." (V 1335)

Whether rate making under general statutes that make the administrative action final unless "unreasonable, arbitrary or capricious" shall be burdened by such a rigorous requirement is the second issue in the case.

On the Transit rate, the Commission found that Transit "is not paying a fair price for its electric service" and "to remove the discrimination found to exist in the rates it pays requires some increase in charges to it" (IV 1175). But the Commission found that it is not practical to accomplish this refinement "in one step" (IV 1171). The readjustment must therefore be made on a gradual basis. It accordingly approved a compromise increase for Transit, in the light of

other rates for high voltage deliveries and the additional costs incurred by the Company in the transformation and conversion of alternating current to the direct current which Transit uses (IV 1162-63, 1171-73).

The decision was made as a practical compromise judgment after considering various factors of record without attempting to relate them to the new rate in any terms of absolute mathematical formula. But Judge Stephens, with apparent support of his colleagues, disapproved the Commission on this further ground that the Commission's opinion does not contain any "consistent line of reasoning . . . from which it follows that street railway rates should be increased by $230,000 on a system basis." (V 1347). The Court of Appeals would apparently require that the precise rate be demonstrated as if in a mathematical problem.

ARGUMENT

1.

Making Rates on System-Wide Figures

A large part of the national economy is served by multi-State utilities. About one billion dollars is collected in annual revenue by electric utilities with systems that are traversed by State lines. Their total investment in electric utility plant exceeds four billion dollars. These systems are located in 39 States (including the District of Columbia).* Many regulatory problems attend upon these large operations. The nature of the rate-making rule is one of the most crucial.

*The interstate systems are shown in Maps of Principal Electric Utility Generating Stations and Transmission Lines, revised 1952 (published by Federal Power Commission). The revenues and investment are shown in Statistics of Electric Utilities in the United States, 1952, Classes A and B Privately Owned Companies (published by Federal Power Commission, Serial No. F. P. C. S-103).

Much time of the local commissions and business managers would be required by a rate-making rule that necessitates a theoretical division of the single system before rates can be made. Much time would be released by a rate-making rule that permits resort, in the discretion of the administrative agency, to system-wide figures that are actual and provable. Confusion and litigation are reduced.

More important still is the life of the people. Single communities have common interests. The immense increase in the population of the United States has multiplied the size of our urban centers. Modern transportation has increased their area. But their civic consciousness and continued health may depend in considerable degree on respecting the unity of their social and economic interests. These needs of the community are no less because of the mere accident that its area may be crossed by political boundaries.

The metropolitan area of Washington is an outstanding illustration. The State lines are mere abstractions. The single community is the practical fact. This situation, while outstanding, is not unique. There are other metropolitan areas traversed by State lines. Moreover, the same considerations apply, alike in quality though less in degree according to the circumstances of the particular case, to wide areas of territory having a similar historical and social background.

For these reasons State-wide rate making is a practice of growing popularity. For example, in Virginia, the various classes of rates apply uniformly throughout the greater portion of the State, thus giving the farmer like treatment with the city worker. The uniform electric rate and the modern system of transportation are instruments of prime importance in shaping the future of our country. Since they permit decentralization, they may even be important, taking into account the hideous implements of modern warfare,

to assure the security of our country and its survival. If such rates are within the discretion of the administrative agency in the absence of political boundaries despite differences of local cost and the city resident has no right to complain that he is subsidizing his rural brother, the mere intervention of a political boundary can not abolish the Commission's power or enlarge his right to complain. If these views are right, as we think they are, it is of public importance that they be established by this Court. If they be wrong, it is also important that the world be told. Certainty on this crucial point of rate making is needed for the interests of good government.

Rates are intensely practical. Their effect on the life of the people is very wide and always growing. The citizen wishes an electric light or a radio or a television whether he resides in Georgetown or in Bethesda. He naturally anticipates that he can have it equally at either place, if within his means at all, rather than find that the operating cost is within his reach on one side of the District boundary but not on the other. Or if establishing his residence on one or the other side of the line because of some supposed difference in costs and some resulting difference in rate levels, he surely does not expect to move back across the boundary again if business changes, always in progress but wholly fortuitous to him, should happen to reverse the cost levels between jurisdictions. Business operations likewise are not immune to costs. If two printing plants, one on the Anacostia River and the other in Montgomery County, pay the same rate and compete in the same market, a rate increase for one alone might put it out of business. People can not move their dwelling or their business with the fluctuations of costs. For the most part they stay and suffer.

History, therefore, is not to be ignored, even by the courts. Where uniform rate schedules have prevailed for a quarter

of a century, as here, alterations of the pattern are of great public moment. They may bring much inconvenience, jealousies and hardship.

In sum, cost is by no means an infallible guide to the good of society. It may indeed conflict. For example, a sparsely settled suburban area in the initial stages of development might cost more to serve than the highly urban center of the unified metropolitan area. But it does not follow that the public interest in the expanding community, which will bring more light, air, parks and military protection, will be promoted by a ring of higher rates around the city. Or if in time the surrounding territory reaches full maturity and the urban center must sustain some special expense like underground conduits or local property taxes, it is not necessarily in the public interest to throttle the old town by higher rates than in the suburbs. Again, if cost levels chance to be identical in the two areas, it may still appear that the outlying area yields a smaller rate of return because of the mere circumstance that the character of its business differs, having relatively fewer commercial customers (which may be profitable) and relatively more residential customers (who for reasons of public policy may be less profitable). It would not be in the public interest to require higher schedules of rates in the residential outlying area than in the more commercial urban center, which together constitute an interdependent economic unit, for the sole purpose that the rate of return within the District and outside should be identical despite differences in the business done. Cost has only an incidental relationship with the public interest. In the railroads, for a concluding example, the promulgation of freight rates on the strict basis of costs would break down our industrial centers and require rearrangement of our economy.

Because of these circumstances it has been an axiom of

rate making throughout all time that the costs of a particular service are not the determinant. They could not be. The determination of costs for the system can be made with relative certainty because its expenses and revenues are actual and definite and put to record. But dividing up the single integrated business into unbalanced parts is quite another matter. While it is easy to separate revenues among jurisdictions according to the customer who paid them, expenses are very different because the system exists to provide service everywhere and each customer benefits from the existence of the others.

We may illustrate by the Company's newest generating station. It is in Virginia (p. 4 above). It was not built there because of the Virginia business. It was needed for business in the District and in Maryland. It was put in Virginia as the best source of water supply. The costs of its operation and a return on its investment must therefore be spread by some theoretical method among all the customers of all the jurisdictions. This is where the experts disagree. Engineers develop theories for attributing different items of cost by different measures of use. Controversies rage over the premises and methods, because minor changes in factors may make major differences in results. A determination, even when made, can not last because the facts are in constant flux. As the Commission found below:

> "The impossibility of determining the cost of service for each individual user or location is apparent. Substantially all of the costs entering into the cost of service vary by location, by season and even by hour of production, and by individual requirements as to demand and use." (IV 1168-69)

Where costs are really in a common pool, as here, nothing is more illusory than their separate attribution. The conclu-

sion is no more accurate than the premise, indeed very often less. Though expressed as a figure, with a semblance of exactitude, it represents only an inference from controversial premises that are subject to constant change. The premises themselves may embody preconceptions of the result, as this Court has said:

> "... considerations of fairness, not mere mathematics, govern the allocation of costs." (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 591, 1945)

Since cost allocations are merely theoretical and costs alone, even if determined exactly, will not be controlling, but a wide range of social factors must be also considered, the general practice of utility rate regulation is to consider all these differing tests and make a decision in the end as an exercise of practical judgment.

But when the Court of Appeals below requires the Commission to establish an equivalent relation of revenues to costs in the District and outside, it prevents the exercise of a practical judgment by the administrative agency and formalizes the rate-making process in an arbitrary mold. This gives no weight to history. It gives no weight to community needs. It gives no freedom to the practical necessities of administrative responsibility. As a rate-making rule it virtually exacts the impossible before performing the necessary.

The decision of the Court of Appeals below is of general applicability. By District statute the court on review is limited to "questions of law" and it is further provided that findings of fact shall be conclusive unless "unreasonable, arbitrary or capricious" (District Code § 43-706, 49 Stat.

882). These words are not local in nature. They are so general that they typify the average regulatory provision throughout the country. Indeed they merge into such constitutional protections as may be afforded by the Fifth and Fourteenth Amendments.

It follows that the decision of the Court of Appeals below carries a widespread threat to simplicity of administrative regulation through large sections of the industry. It is of public importance that the question be reviewed by this Court and the governing standard established clearly.

This Court has had scant opportunity to pass on rate fixing by State administrative agencies for multi-State utilities. In *Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133, 1930, the most prominent of such cases, the facts revealed a danger that a rate reduction ordered by a State agency would so starve the intrastate business of the utility as to disable it from performing its interstate business and thus defeat the Federal power of regulation. An allocation of separate costs in the local business was accordingly required. But in *Lone Star Gas Co.* v. *Texas,* 304 U. S. 224, 1938, the latest of such cases, the Court sustained a State administrative order reducing rates of a multi-State utility on the basis of system-wide figures without any allocation, saying that, in contrast to the *Smith Case,*

> "This was not a case where the segregation of properties and business was essential in order to confine the exercise of state power to its own proper province." (241)

Presumably this was for the reason that the Texas order did not threaten to obstruct the regulatory power of Oklahoma, so that Texas was free to determine costs and fix rates in any way it thought reasonable. But unhappily the

Court did not say so. Except by the quoted words the Court did not explain why that was not a case requiring segregation. The question remains unsettled.

In this state of uncertainty the *Smith Case* has commonly been thought to require some theoretical segregation of costs at every political boundary before the commission can fix rates for a multi-State utility. The present case affords a striking illustration of the extent of this confusion. Originally the doctrine was laid down for the sole purpose of preventing one regulatory sovereign from encroaching upon another by reducing rates below a remunerative level. There the rate was attacked as too low. But the doctrine was applied here by the Court of Appeals to an order *increasing* local rates, which was attacked only as making rates too high. This could not by any possibility tend to obstruct regulation by the Federal Government of the interstate portions of the Company's business or regulation by Maryland and Virginia of the local business within their borders. Indeed all three local agencies concurred in the same rate schedules. So it is only the Court of Appeals that obstructs the normal and proper accommodation of local interests because of its absorption in the theory of costs and its exaggerated respect for the technicalities of formulae.

The confusion is such that contrary decisions on the identical point with regard to the metropolitan area of Washington have been reached in adjoining circuits. The Court of Appeals below requires an allocation as a condition precedent to making rates within the District. But a statutory court of three judges in Virginia, including Dobie, C. J., and two District Judges, sustains an order of the Interstate Commerce Commission fixing bus fares between the District and suburban Virginia on the basis of system-wide figures without any allocation, saying:

> "The *inter* and *intra* business are one entire operation, the latter as an integral part of the other. In these circumstances, for rate ascertainments, no separation is helpful. Neither reason nor expediency imposes such an obligation and the law has not." (*County Board of Arlington County* v. *United States*, 101 F. Supp. 328, 331, 1951)

This conflict between Circuits, and the confusion that results, should be brought to an end.*

This case affords a startling example of the consequences of such confusion. The Company's application for a rate increase was filed on July 28, 1950 (III 769). In a comprehensive opinion of February 12, 1951, the Commission held that, as it had done for 25 years, it was entitled to make rates on the basis of system-wide figures without theoretical allocations (IV 1111). The District Court, by an opinion of April 30, 1952, agreed with this view and sustained the Commission's order (III 733). The Court of Appeals was apparently so uncertain whether an allocation was prerequisite or not that it held the case under advisement for a full year. On December 10, 1953, it finally held in effect that an allocation was necessary and that further proceedings before the Commission should ensue (V 1350). In the meantime the increased rates have been collected. But as long as litigation continues, uncertainties remain. In effect these touch not only the level of future rates, but also, at least in part, the fund that has been collected,

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*This confusion is wider than the electric utility industry. All interstate utilities must meet the problem in varying degrees. It is difficult to believe that the cases that require allocations for natural gas pipe lines (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 1945) are fully consistent with the cases dispensing with such requirement in the case of railroads upon some very general finding of similar conditions and interrelated facilities (*Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 1934).

as shown by the petition of Capital Transit Company in No. 740. These uncertainties have so clouded the position of the Company in the financial markets that it has not been able to finance its new money requirements on reasonable terms. In consequence, its 1954 program for additions to operating plant in the public interest has had to be cut back pending disposition of this proceeding. This is contrary to reasonable business interests of consumers and investors alike. It is illustrative of wider uncertainties that impede the efficient discharge of administrative responsibilities whenever multi-State utilities are involved. The Court has an opportunity in this case to make clear the basic rule for such situations.

There can be no doubt that the Court of Appeals is requiring an allocation of costs and is doing so because of the *Smith Case*. One should not be misled when it disclaims any intention to require an allocation in the ascertainment of over-all revenue needs that must be met for financial health, because it goes on to require an allocation. Before any rate can be fixed, the court requires an allocation in order, as it said, to show

> ". . . whether rates fixed by the Commission for the District are on a higher level than they reasonably and justly should be due to other sources not bearing their fair share of revenues." (V 1329)

It is immaterial that the system may be considered in its entirety as to one or two questions in the rate-making problem if some other question in the rate-making problem necessitates the allocation. The Commission is no less condemned to the uncertainties of the allocation route. Indeed the words of the court may embody a still more stringent requirement that the judge as well as the commissioner be

enabled to exercise his independent judgment of fairness. The court says that "We must be able to say" that the rates are reasonable (V 1325). This would substitute the court for the commission and make the whole administrative proceeding a futility.

For all these reasons, we think it of urgent public importance that the rate-fixing agency be free to exercise its discretion in the light of social and economic needs as freely where the system is traversed by political boundaries as in their absence. It is then no less required by the public interest itself. Nor is it any the less permissible because of the jurisdictional line, always assuming that the local agency acts only on rates within its territory and that there is no complaint of conflict between competing regulatory agencies, which there is not here. With such a rate-making standard clearly established, the administrative process throughout a large portion of the industry would be free from the heavy hand of the unprovable. If the decision of the Court of Appeals be left by denial of review, it will probably prevent all electric utility rate making on a system-wide basis where political boundaries exist, because in no case could it be so plainly warranted as in this concentrated system in the single metropolitan area of Washington. To reverse the Court of Appeals and sustain the Commission would not establish integrated system rate making across all political boundaries, since that would depend upon the particular circumstances of the particular situations. But to sustain the Court of Appeals, by refusal to review or by affirmance, would very probably preclude this practical and salutary approach in the case of any electric utility.

The question before the Court of Appeals involves the cornerstone of the entire structure of rates for every system that crosses a State line. It is a point that has not been

settled by decisions of this Court, but should be for reasons of wide national interest.

2.

Sufficiency of Commission Findings

While the Court of Appeals purports to respect the administrative process, it imposes such rigid requirements as to leave no reasonable liberty of action. The ground of the decision is not any peculiarity of District law, but rather the interplay of administrative action and judicial review. This is a circumstance of general application so that the decision may lead to obstructive consequences in the general development of the law.

This Court has emphasized that permissible earnings are a matter of practical judgment and that it is the result that counts and not the intermediate steps of reasoning (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 1944). It is in conflict with this decision for the Court of Appeals to insist that a rate of return well within the levels currently approved in numerous tribunals must be justified by piecemeal reasoning on each step of the mathematical problem. No consideration was given in this regard to the *Hope* decision. The Court of Appeals turned instead to earlier decisions of its own:

> "These rulings by this court in my view require a commission, in reaching a decision as to a reasonable rate of return under the prudent investment theory of rate regulation, to make findings upon the following underlying issues: the return necessary to service the outstanding funded debt, if any, of the utility; the return necessary to service its preferred stock, if such stock is outstanding; the return necessary to attract investors in common stock; the return on funded debts

> preferred stock, and common stock in other public utilities having a risk factor similar to that of the utility under consideration; and, if the commission has relied upon a rate of return determined in a previous proceeding involving the same utility, a further finding upon the question whether or not pertinent local conditions, economic conditions generally, and the risk factor have remained static during the intervening period." (V 1334-35)

If the Commission had to make findings on each of these particularities, it is hard to find any basis for the exercise of its expert judgment on the over-all problem. Such could not have been this Court's intention when the doctrine of the *Hope Case* was announced.

The further decision of the Court of Appeals on the Transit rate is comparable in this respect. Here the Court of Appeals requires a series of mathematical steps of a nature to demonstrate some precise figure for the Transit rate increase. This strays far from the usual tenor of judicial review. Remembering that Commission findings on the facts are conclusive, the Court of Appeals should have recognized the practical necessities of administrative action. It should have recognized that no rate is precisely provable. It should have allowed freedom for compromise. And in a practical appraisal of this record, the Court of Appeals should have appreciated that if the rate prescribed for Transit was erroneous in any respect, its error lay in its being too low so that no realistic objection could be heard from Transit.

These cumulative errors of the Court of Appeals so fetter the future action of the District Commission, and raise such restrictive implications for review in other jurisdictions, as to merit review by this Court. Especially when the basic question referred to in 1 above calls for determination by

this Court, it is desirable that the writ be granted on all these questions so that the Commission's action may be affirmed, this overlong litigation brought to a close in the public interest and workable rules established for regulation of rates of multi-State electric utilities throughout the country.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

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Dated May 8, 1954.

APPENDIX

Excerpts from the District of Columbia Code, 1951 Edition.

The pertinent provisions of the District of Columbia Code, 1951 Edition, dealing with utility regulation, are set forth below:

§ 43-301. Public Utilities—Service and facilities—Charges to be reasonable, just, and nondiscriminatory—To obey orders of Commission.

Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just, and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by chapters 1-10 of this title. (Mar. 4, 1913, 37 Stat. 977, ch. 150, § 8, par. 2.)

§ 43-323. Schedule of rates to be filed—Existing rates to remain in force until changed.

Every public utility shall file with the commission, within a time to be fixed by the commission, schedules, which shall be open to public inspection, showing all rates, tolls, and charges which it has established and which are in force at the time for any service performed by it within the District of Columbia, or for any service in connection therewith or performed by any public utility controlled or operated by

it. The rates, tolls, and charges shown on such schedules shall not exceed the rates, tolls, and charges allowed by law on March 4, 1913, and shall be the lawful rates, tolls, and charges within the District of Columbia, and shall remain and be in force until set aside by the commission. (Mar. 4, 1913, 37 Stat. 981, ch. 150, § 8, par. 24.)

§ 43-401. Existing rates continued—Schedules to be filed—Application to change rates—Review of ruling by District Court.

First, unless the commission shall otherwise order, it shall be unlawful for any public utility within the District of Columbia to demand, collect, or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service under the law in force on March 4, 1913; second, every public utility in the District of Columbia shall, within thirty days after March 4, 1913, file in the office of the commission copies of all schedules of rates and charges, including joint rates, in force on March 4, 1913; third, any public utility desiring to advance or discontinue any such rate or rates may make application to the commission in writing, stating the advance in or discontinuance of the rate or rates desired, giving the reasons for such advance or discontinuance; fourth, upon receiving such application the commission shall fix a time and place for hearing, and give such notice to interested parties as shall be proper and reasonable; if, after such hearing and investigation, the commission shall find that the change or discontinuance applied for is reasonable, fair, and just, it shall grant the application, either in whole or in part; fifth, any public utility being dissatisfied with any order of the commission made under the provisions of this section may commence a proceeding against it in the

District Court of the United States for the District of Columbia in the manner as is in chapters 1-10 of this title provided, which action shall be tried and determined in the same manner as is in chapters 1-10 of this title provided. (Mar. 4, 1913, 37 Stat. 994, ch. 150, §8, par. 94.)

§43-408. Commission may investigate unjust discriminatory rates—No order to be entered without formal hearing.

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or that any time schedule, regulation, or act whatsoever affecting or relating to the conduct of any street railway or common carrier, or the production, transmission, delivery, or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telegraph or telephone message, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the commission without a formal hearing. (Mar. 4, 1913, 37 Stat. 983, ch. 150, §8, par. 38.)

§43-411. Reasonable rates may be ordered—Notice to be given utility affected thereby.

If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreason-

able, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of chapters 1-10 of this title, the commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, tolls, charges, or schedules as shall be just and reasonable. If upon such investigation it shall be found that any regulation, time schedule, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this section, or if it is to be found that reasonable service is not supplied, the commission shall have power to determine and substitute therefor such other regulations, time schedules, service, or acts and to make such orders respecting and such changes in such regulations, time schedules, service, or acts as shall be just and reasonable. And upon any investigation for the purpose of determining upon and requiring any reasonable extension or extensions of lines or of service that shall promise to be compensatory within a reasonable time, the commission shall have power to fix, determine, and require every such extension or extensions to be made and the terms and conditions upon which the same shall be made: *Provided,* That no hearing shall be had and no order shall be made respecting such extension or extensions, without notice to the public utility affected thereby, as provided in section 43-410. (Mar. 4, 1913, 37 Stat. 983, ch. 150, § 8, par. 41.)

§ 43-704. Application to District Court for instructions—Application for reconsideration.

. . . . . .

Any public utility or any other person or corporation affected by any final order or decision of the commission

may, within thirty days after the publication thereof, file with the commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility or other person or corporation shall in any court urge or rely on any ground not so set forth in said application. The commission, within thirty days after the filing of such application, shall either grant or deny it. Failure by the commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted, the commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application: *Provided,* That upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined.

§43-705. Appeal to District Court from certain orders—Precedence over other civil causes—Proceeding when additional evidence proper—Statement to accompany decision—Subsequent appeals—Commission not liable for costs or damages.

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission,

other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: *Provided,* That the parties, with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District Court of the United States for the District of Columbia shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence

was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of

the United States. (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, § 2.)

§ 43-706. Appeal limited to questions of law.

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious.

§ 43-710. Method of review exclusive.

The method of review of the orders and decisions of the Commission provided by paragraphs 43-704 to 43-709, herein, shall be exclusive.

§ 43-911. Commission may regulate unreasonable and discriminatory rates and fix new rates.

Whenever, after hearing and investigation as provided in chapters 1-10 of this title the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in chapters 1-10 of this title. (Mar. 4, 1913, 37 Stat. 992, ch. 150, § 8, par. 88.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 750

POTOMAC ELECTRIC POWER COMPANY, *Petitioner*,

v.

CAPITAL TRANSIT COMPANY, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 1318) is not yet reported. The opinion of the District Court (R. 733) is reported at 104 F. Supp. 553. The Orders No. 3762 (R. 1111) and No. 3774 (R. 1197) of the Public Utilities Commission of the District of Columbia (Commission) are not reported.

JURISDICTION

No exception is taken to the statement as to jurisdiction in the petition of Potomac Electric Power Company (Pepco) in No. 750. It should be observed, however, that Capital Transit Company (Transit) filed a petition for writ of certiorari (No. 740) in this Court on April 30, 1954, so the instant petition for writ of certiorari filed by Pepco is actually a cross-petition, although not so termed. All references herein are to the petition in No. 750 unless otherwise stated.

QUESTIONS PRESENTED

In the opinion of the Respondent, the questions presented are:

1. Does the Public Utilities Commission of the District of Columbia have authority to establish, on a system basis, rates for the District of Columbia services of a utility which sells its services not only to the public in the District but also in Maryland and Virginia, and in interstate commerce at wholesale, without proper findings of fact establishing that similar conditions pertinent to rate fixing exist throughout its system when the rates are uniform or, where the rates are different, by proper findings justifying the differences, or, if such findings cannot be made, without a proper allocation of revenues and costs between system and District operations?

2. Whether a regulatory agency fixing rates for a utility under the prudent investment theory of rate making must support its rate of return determination with sufficient findings of fact supported by evidence of record so as to enable a reviewing court to perform the review functions entrusted to it by Congress.

STATUTES INVOLVED

The pertinent statutes involved are set forth in the Appendix to the petition.

STATEMENT

Transit feels that the statement in the petition does not adequately state the facts pertinent to the questions presented. A detailed statement of the facts in this case generally may be found in the Petition for a Writ of Certiorari, No. 740, October Term, 1953, filed by Transit in this Court on April 30, 1954. The facts bearing particularly on the questions raised in this petition (No. 750), may be summarized as follows:

Pepco commenced this rate proceeding before the Commission in 1950 (R. 757-769). Transit, as a ratepayer, intervened (R. 773). When the proceeding was appealed to the District Court, and from that Court to the Court of Appeals, the Commission participated as an active party. The Commission joined with Pepco in filing briefs on the merits of the case and presented oral argument by its counsel to the respective Courts. The Commission, however, did not join with Pepco in this petition for writ of certiorari (No. 750) nor did it file a brief in opposition to Transit's petition (No. 740).

Pepco operates an integrated system supplying electric energy to the public in the District of Columbia and contiguous areas in Virginia and Maryland. This system covers an area of about 639 square miles of which the District of Columbia accounts for only 69 square miles. Its service area in Maryland extends 20 miles beyond the District of Columbia. (Tr. 2836; Ex. 16, R. 808-813). The Public Utilities Commission of the District of Columbia has jurisdiction over Pepco's service rates in the District only. The rates for Pepco's electric services to the public in Maryland and Virginia are subject to the jurisdiction of the Public Service Commission of Maryland and the State Corporation Commission of Virginia, respectively. Pepco also furnishes electric energy at wholesale for resale to an electric utility in Maryland and to an electric utility in Virginia. These interstate sales are subject to the jurisdiction of the Federal Power Commission. (R. 1113-1114, 1320, 1328.)

Pepco presented its evidence for increased rates on the basis of system-wide operations, showing its system-wide rate base, its system-wide operating expenses, and its system-wide revenues (R. 1115). This was done in the face of Transit's contention that system-wide figures were insufficient to support an application for increase in District of Columbia rates, and that there should be an allocation or segregation between the revenues and costs of the system and the District operations (R. 75-76, 255-256).

In presenting its rate of return evidence, Pepco showed merely what it considered to be its dollar needs for the maintenance of a sound financial position in the light of contemplated financing. It did not attempt to adduce evidence of a proper rate of return to be applied to its rate base. (R. 1147-1148.)

Upon the completion of the hearings and submission of briefs, the Commission issued its Order No. 3762 (R. 1111-1177). In this order the Commission found: (1) that Pepco was entitled to increases in its rates that would produce an annual increase of $2,600,000 in its system-wide operating revenues; (2) that the increase should be applied to each class of customer in the ratios determined; and (3) that under the prudent investment theory of rate regulation Pepco was entitled to a rate of return of 5½% on its rate base (R. 1176-1177). The Commission ordered Pepco to file rate schedules with the Commission setting forth increased rates designed to produce a $2,600,000 increase in system-wide revenues (R. 1177).

Pepco filed rate schedules with the Commission as directed, and on March 20, 1951, the Commission, by Order No. 3774, approved the schedules of increased rates and ordered them effective in the District of Columbia as of April 20, 1951. These involved an increase to Transit in the rates for energy for its steel railways and other electric services in the amount of $223,000 annually for the system and $209,000 for the District (R. 1197-1199).

Transit, and other District of Columbia consumers, following denial of their applications for reconsideration, appealed, pursuant to § 43-705, D. C. Code (1951), to the District Court (R. 1179, 1220-1223). That Court, on April 30, 1952, affirmed the orders of the Commission and judgment was entered on May 7, 1952 (R. 733-752). Transit appealed the judgment of the District Court to the Court of Appeals for the District of Columbia (R. 752-753).

In the Court of Appeals, Transit argued that Order No. 3762 and Order No. 3774 were invalid for three reasons: *First:* The Commission lacked authority to fix District of Columbia rates on the basis of system operations alone. *Second:* The Commission had not taken sufficient evidence or made adequate findings essential to a proper rate of return determination under the prudent investment theory of rate making as required by the decisions of this Court and the decision of the Court of Appeals in *Washington Gas Light Co.* v. *Baker,* 188 F. 2d 11 (1950), *certiorari denied,* 340 U.S. 952. *Third:* The increase ordered in street railway rates was invalid for failure of the Commission to make adequate findings in support thereof.

On December 10, 1953, the Court of Appeals issued its opinion and judgment reversing the District Court's judgment affirming Order No. 3762 and Order No. 3774 (R. 1318). The opinion of the Court below decided only the first two issues, although the opinion of the Court made clear that, if it had found it necessary to adjudicate the third issue, it would have agreed with Transit's position that the increase to Transit was unsupported by findings (R. 1331, 1338-1349).

The Court unanimously held on the first issue that the Commission, in fixing rates for District of Columbia consumers, could not, under the controlling decisions of this Court, rely solely on the revenues and expenses of the operations of Pepco's system—a system that extends beyond the boundaries of the District and also involved sales in interstate commerce. On the contrary, the Com-

mission was required, as the Court held, to make findings supported by evidence, showing the basis for those rates in relation to or as a part of the system-wide rate schedules. (R. 1325-1326).

The Court found that the Commission's orders did not contain the requisite findings to permit a determination whether the District of Columbia rates were just, reasonable and non-discriminatory, as required by the controlling statute (§ 43-301, D. C. Code (1951)). The Court stated that, while it was permissible to sustain District rates under the system-wide treatment of certain factors, and that no one formula was exclusive, the rates must also be supported "by findings of similar conditions pertinent to rate-fixing where the other rates are similar or, where the other rates are different, by findings of other relevant economic conditions which justify on a rational basis the District rates in relation to * * * the system-wide schedules." (R. 1329-1330.) If this could not be done, then it would be necessary, the Court ruled, to resort to allocation (R. 1330).

On the issue of rate of return, a majority of the Court found that the Commission which used the prudent investment theory of rate regulation, had not followed the requirements established by this Court and by its own precedent in *Washington Gas Light Co.* v. *Baker, supra,* for the determination of a reasonable rate of return (R. 1332-1333). The Court found that it was necessary, in order to reach a decision as to a reasonable rate of return under the prudent investment theory, to make findings on the return necessary to service the funded debt, the preferred stock and to attract investors in common stock; the comparable return on securities of other public utilities having a risk factor similar to that of the utility under consideration; and, if the Commission relied upon a rate of return determined in a prior proceeding, a further finding that the pertinent local conditions, economic conditions and risk factor have remained stable during the intervening period

(R. 1334-1335). A majority of the Court below held that the Commission had not made these required findings and that there was insufficient evidence in the record on the subject of rate of return (R. 1335-1337).

The Court, finding the Commission's orders erroneous, reversed the judgment of the District Court and remanded the case to that Court with instructions to remand the case to the Commission for further proceedings in accordance with the Court's opinion (R. 1331).

On December 23, 1953, Transit filed a motion asking the Court of Appeals to clarify its opinion and modify its judgment to make clear that the challenged orders were invalid and of no effect, that Transit was entitled to restitution, and for other relief (R. 1351). The Commission and Pepco filed their answer to this motion on January 4, 1954 (R. 1362), and Transit filed its reply to this answer on January 11, 1954 (R. 1378). On February 25, 1954, the Court of Appeals issued its order on Transit's motion modifying its judgment so as to provide for a segregation of funds on the books of Transit and Pepco and denying all other requested relief (R. 1390).

ARGUMENT

Introduction

Since Transit has filed a petition in this cause requesting this Court to issue a writ of certiorari to the Court of Appeals and to review the action of that Court, we feel we should, at this point, briefly state Transit's position on the merits of this case.

Transit does not challenge the decision of the Court of Appeals on the merits that the orders of the Commission and the affirming judgment of the District Court were erroneous. Transit challenges only the action taken by the Court of Appeals in framing its decree following its decision on the merits of the case. Transit's petition for a writ of certiorari (No. 740) sets forth that the Court of

Appeals' instructions to the District Court to remand the case to the Commission are in excess of its statutory jurisdiction and that its failure to order restored to Transit the amounts paid under the erroneous rate orders and to set aside such orders was in error. In all other aspects of the case Transit is in complete agreement with the decision of the Court of Appeals.

I.

The Decision of the Court of Appeals on the Issue of Allocation was Required by and is in Accord with the Decisions of this Court. There is No Conflict with the Decisions of Any Other Courts of Appeal and No Reason Why the Petition for Writ of Certiorari Should be Granted.

In presenting its arguments to this Court supporting its petition for a writ of certiorari, Pepco has created the erroneous impression that the action of the Court of Appeals in its decision of the allocation issue was novel and unprecedented. The exact contrary is true. In rejecting Pepco's contention that the political boundaries traversing its service area could be completely ignored in determining its rates, the Court of Appeals was adhering to the traditional and universally accepted practice of rate fixing in comparable situations. Moreover, the Court of Appeals reached its decision after serious consideration of the many decisions of this Court which have upheld the requirement of an allocation of the regulable and non-regulable operations of a utility where the regulatory commission has jurisdiction over less than all of the utility's operations.[1]

The predominant purpose of the allocation requirement, as clearly set forth in *Smyth* v. *Ames*, 169 U.S. 466 (1898);[2] *The Minnesota Rate Cases*, 230 U.S. 352 (1913);

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[1] In the case of all other major utilities operating in the Washington metropolitan area, including Transit, the Commission has insisted that an allocation be made with respect to the District and non-District operations (revenues and expenses) of the utility.

[2] Whatever doubts later decisions have cast upon *Smyth* v. *Ames* as authority for "fair value" rate regulation, its holding on

Smith v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); and *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581 (1945), is to insure: (1) that the utility is not forced to resort to the profits from operations beyond the jurisdiction of the regulatory commission to offset insufficient regulated rates; and (2) that the ratepayers shall not be forced to subsidize the utility by bearing a disproportionate share of the costs of its operations which are beyond the jurisdiction of the commission which fixes the rates they pay. The problem, as stated by Mr. Justice Douglas in the *Colorado Interstate* case, *supra*, " * * * is to allocate to each class of the business its fair share of the costs." (324 U.S., at 588). In other words, an allocation under the circumstances is an essential ingredient of any rate determination by a regulatory commission under a standard calling for the establishment of reasonable, just and non-discriminatory rates—the standard governing the Commission in determining utility rates in the District (R. 1321).

An apparent, but not actual, exception to this rule has been created by the decision of this Court in *Illinois Commerce Commission* v. *United States*, 292 U.S. 474 (1934). The effect of that case, as pointed out by the Court below (R. 1326), is that where the economic conditions in the different jurisdictions served are found to be substantially the same with respect to all features bearing on the reasonableness of the rates, there is no need to separate (allocate) costs and revenues according to jurisdictional lines. However, this decision does not derogate from the principle underlying the allocation requirement as set forth in the *Colorado Interstate* case, *supra*, since its effect is that, if the conditions bearing on rates are found to be

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the requirement of allocation has never been impaired. In addition to the cases cited in the text, the following cases support the allocation or segregation requirement: *San Diego Land & Town Co.* v. *National City*, 174 U.S. 739 (1899); *Chicago M. & St. P. Ry. Co.* v. *Tompkins*, 176 U.S. 167 (1900); and *Wabash Valley Elec. Co.* v. *Young*, 287 U.S. 488 (1933).

substantially the same on both sides of the jurisdictional lines, each part of the integrated business will then bear its fair share of the costs.

In the case of Pepco, four different regulatory commissions have jurisdiction over its rates for its electrical services. The commissions for the District of Columbia, Maryland and Virginia have the power to fix Pepco's rates for sales of energy to the public in their respective areas, while the Federal Power Commission has jurisdiction over Pepco's not insubstantial sales in interstate commerce to other electric utilities (R. 1320, 1328). In this situation, the Court of Appeals determined that the District Commission was obligated to fix Pepco's District rates in such a manner as to comply with the principles applicable in comparable situations, which have been laid down by this Court in the cases cited above. The Court below stated:

> "* * * We must be able to say that the rates in the District are reasonable, just and nondiscriminatory as a part of, or in relation to, the system rates contained in the schedules of the Power Company for areas and services beyond the Commission's jurisdiction; *that is to say, that District consumers do not subsidize the non-District, or, indeed, vice versa.* * * * " (R. 1325; emphasis supplied.)

The Court below did not insist that the Commission follow any particular path or adopt any specified formula in determining whether the District rates were reasonable, just and nondiscriminatory as a part of or in relation to the system rates. But it did insist—and properly so—that the problem could not be ignored. The Court, in strict conformity with the decision of this Court in the case of *Illinois Commerce Commission, supra,* and with the other decisions of this Court on allocation to which we have referred above, held:

> "* * * Where these rates are arrived at by formulating schedules on a system-wide basis, extending into other jurisdictions, they must be supported also by

findings of similar conditions pertinent to rate-fixing where the other rates are similar or, where the other rates are different, by findings of other relevant economic conditions which justify on a rational basis the District rates in relation to the other; that is, as part of the system-wide schedules. If this cannot be done then it would seem necessary to resort to allocation. The other rates here referred to are those in the urban zone in Virginia and Maryland, the suburban zone in Maryland, and those for interstate services exclusive of the interchange arrangements." (R. 1329-1330.)

The Commission, in fixing Pepco's rates in this case, had proceeded on the theory that it was permitted to consider only the operations of the system and could ignore jurisdictional boundaries. Accordingly, the Court below determined that the Commission had neither made an allocation nor made findings as required by the decision in the case of *Illinois Commerce Commission, supra,* or otherwise, disclosing any rational basis for Pepco's District rates in relation to or as a part of its schedule of rates for Pepco's entire system. Since these findings, essential to an adequate review of the Commission's orders, were lacking, the Court below held that Transit had sustained its attack upon the challenged orders. In its careful consideration of, and in its decision on, the issue of allocation, it is apparent that the Court of Appeals was following a path clearly defined by the decisions of this Court. Pepco, in its petition, has not pointed to a single case decided by this Court or by any of the other courts of appeal which conflicts with the instant decision.

The petitioner has devoted much space in its petition to an attempt to show that the fact that it serves the "metropolitan area" of Washington somehow makes it immune to the requirement that its operations within the Commission's jurisdiction must be segregated from its system-wide operations (Petition, pp. 10-14). A short but sufficient answer is that the requirement of allocation is mandatory unless the special facts and conditions of *Illinois*

Commerce Commission v. *United States, supra,* are found to be present. The purpose to be served by an allocation where jurisdictional boundaries appear is identical whether the utility's service area is large or small. Without an allocation or its equivalent, the rate-payers in one jurisdiction may be forced to subsidize those in the adjoining jurisdiction irrespective of the size or other physical characteristics of the respective areas.

The petitioner also makes much of the fact that it operates an "integrated" system and that one of its power stations, located in Virginia, in connection with its power plants in the District of Columbia, serves the entire system without reference to geographical location (Petition, pp. 4, 13). These considerations are entirely irrelevant. They form no basis for an argument against allocation. In every case in which allocation is involved, there will be common facilities—facilities which serve both the regulated and the unregulated operations. In fact, if there were no such shared facilities and each separate jurisdiction were served by a self-sufficient, unitary operation, there would be no problem of allocation since the revenues and costs of each separate operation would automatically be segregated.

Pepco has alleged a conflict between the decision of the Court of Appeals on the issue of allocation and a decision of a statutory District Court in *County Board of Arlington County, Va.* v. *United States,* 101 F. Supp. 328 (1951). We hardly think that, in the brief one-paragraph discussion of this issue, the District Court was establishing a precedent at variance with the many decisions of this Court set forth above requiring the application of the allocation requirement.

The action of the Court of Appeals on this issue was clearly correct and in complete accord with the established precedents of this Court. Pepco has not shown the existence of a conflict requiring review by this Court. Furthermore, Pepco has not shown that the question is one of such

national interest that this Court should consider the matter, or that any other reason exists why this Court should grant the petition in order to review the decision of the Court below on this issue.

II.

The Decision of the Court of Appeals on the Issue of Rate of Return Was Required by and is in Accord with the Decisions of this Court. There is No Conflict with Decisions of Other Courts of Appeal and No Valid Reason Has Been Advanced in Support of the Granting of the Petition for Writ of Certiorari on this Issue.

Pepco has alleged that the decision of the Court of Appeals with respect to the rate of return issue is in conflict with the decision of this Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) (Petition, p. 20). Pepco has further alleged that the requirements laid down by the Court of Appeals imposed such "rigid requirements" as to leave the Commission no liberty of action (*ibid.*). Both contentions are clearly unfounded.

The Court of Appeals was not drawing solely on its own precedent (*Washington Gas Light Co.* v. *Baker*, 188 F. 2d 11 (1950), *certiorari denied*, 340 U.S. 952) when it set forth the requirements for a proper rate of return determination under the prudent investment theory of rate making. It also drew on the numerous precedents established by this Court on the subject of rate making including the decision in the *Hope* case, *supra*. These cases demonstrate that the decision of the Court of Appeals is in accord with the principles of rate making established by this Court.[3]

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[3] In the instant case the Court below relied upon *Washington Gas Light Co.* v. *Baker*, *supra*, in which it had only three years previously determined that the same Commission had failed to follow the precedents of this Court in fixing the rate of return of the Washington Gas Light Company. In that case, the decisions of this Court were cited and discussed.

In *Federal Power Commission* v. *Pipeline Co.*, 315 U.S. 575 (1942), this Court declared that the Constitution did not bind rate-making bodies to the use of any single formula or combination of formulas. This Court said:

> "* * * Once a fair hearing has been given, *proper findings made* and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. * * * " (315 U.S., at 586; emphasis supplied.)

Nothing in the *Hope* case, *supra*, contradicts this requirement for proper findings of fact as prerequisite to valid rate orders. The necessity for proper findings in administrative orders has been emphasized by this Court. *Florida* v. *United States*, 282 U.S. 194 (1931); *United States* v. *B. & O. R. Co.*, 293 U.S. 454 (1935). The administrative body must set forth a basis for its conclusion that the rates it has determined are reasonable, just and nondiscriminatory. Essential to such a conclusion under the prudent investment theory is a determination of the rate of return that the regulated utility may earn. This rate of return must likewise be supported by findings of fact based on evidence of record so that a reviewing court may follow the path taken by the Commission. "The courts cannot perform the function which Congress assigned to them in absence of adequate findings." *Colorado-Wyoming Co.* v. *Comm'n*, 324 U.S. 626, 634 (1945); see also *Washington Gas Light Co.* v. *Baker*, *supra*, at 17.

The requirements for a proper rate of return determination under the prudent investment theory of rate making propounded by the Court of Appeals (R. 1334-1335) are not novel or unprecedented. In both the *Hope* case, *supra*, and in *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U.S. 581 (1945) this Court held that an adequate return to the utility must be sufficient to provide revenue for operating expenses as well as for the capital costs of the business including service on the debt and dividends

on the stock. The return should be commensurate with returns on investments in other enterprises having corresponding risks and should be sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital. All of these requirements had been crystallized through repeated statements in previous decisions of this Court. *Southwestern Bell Tel. Co.* v. *Public Service Comm.*, 262 U.S., at 290-291 (1923) (dissenting opinion of Mr. Justice Brandeis); *Bluefield Co.* v. *Public Service Comm.*, 262 U.S. 679 (1923); *Driscoll* v. *Edison Co.*, 307 U.S. 104 (1939); see also *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. 339, 345-346 (1892). It was because of these requirements that this Court held in the *Colorado Interstate* case, *supra*, that the rule laid down in the *Hope* case was not "vague and devoid of meaning" but was "a standard of finance resting on stubborn facts." (324 U.S., at 605.)

The Court of Appeals searched the Commission's orders for findings of fact based on evidence which would fulfill the requirements established by this Court in the cases discussed above. Determining that such findings and evidence were lacking, the Court of Appeals correctly reversed the judgment of the District Court affirming the Commission's orders. Such action was dictated by precedent. *Florida* v. *United States, supra; United States* v. *B. & O. R. Co., supra; Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433 (1947).

The decision of the Court of Appeals on rate of return will not lead to "obstructive consequences" in the field of rate regulation (Petition, p. 20). It does not tie the Commission to a set formula. The decision of the Court only requires that the Commission support its conclusions with adequate findings of fact based on evidence. If there are conditions, other than those enumerated by the Court below in its opinion, which are pertinent to a proper rate of return determination, these conditions should also be supplied in findings of fact and considered by the Commission

in reaching its conclusion as to rate of return. In following this method the Commission would furnish a basis for review of its conclusions and the appellate court would be able to intelligently exercise its reviewing functions imposed upon it by law.[4]

The petitioner has not shown that the decision of the Court of Appeals on this issue is in conflict with any decision of this Court or with any decision of other courts of appeal. Indeed, it has been shown that the Court's action is in exact accord with established precedent and that there is no question of national importance involved. Therefore, the petition for writ of certiorari should be denied.

III.

The Third Issue—The Amount of the Increase to Transit—Was Not Decided by the Court of Appeals and Is Not a Proper Issue Before This Court.

Pepco has based a part of its argument in support of its petition for writ of certiorari on the premise that the third issue in the case—The Amount of the Increase to Transit—is ripe for consideration by this Court. (See Petition, Questions Presented, 3, p. 2, pp. 8-9, 21-22.) Although Chief Judge Stephens expressed his views in a dissenting opinion, the majority of the Court of Appeals held that it was not necessary at that time to rule on this phase of the case in light of the further proceedings required by the decision

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[4] Although, as stated in the text, the findings specified are necessary to enable the reviewing court to determine whether the Commission has complied with the rate of return requirements set forth by this Court, it is pertinent to observe that the Court below had decided in *Washingon Gas Light Co.* v. *Baker, supra,* only three years previously that the same Commission had committed error in determining the rate of return for another utility. The action of the Commission in ignoring that decision and committing almost the identical rate of return error in the instant case may well have persuaded the Court below that only a detailed explanation of the essentials of a proper rate of return determination would be heeded by the Commission.

of the Court. This issue, therefore, is not yet ripe for consideration by this Court.

Even if this question were not prematurely raised in Pepco's petition for writ of certiorari, the views of Chief Judge Stephens of the Court below on the merits of this issue were clearly correct.[5] The same considerations which prompted the Court below to reverse the judgment of the District Court because the Commission's orders lacked adequate basic findings of fact on the first and second issues also caused the Court of Appeals to indicate that these basic findings were lacking as to this issue. Pepco has not even claimed a conflict of decisions and, in any event, the matter is solely of local importance.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] The majority of the Court below made clear that if the same issue were ready for adjudication they would have agreed with the opinion of the Chief Judge.